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# IT'S NOT EASY BEING GREEN—A GREEN BUILDING, THAT IS: HOW TO AVOID DISPUTES AND ALLOCATE RISKS IN THE MODERN GREEN BUILDING MOVEMENT

*Constance J. Brewster\**

## I. INTRODUCTION

One of the hottest trends in construction and development is that of environmentally friendly building.<sup>1</sup> This popular trend, coined “green building,” “is the practice of creating and using healthier and more [sustainable and] resource-efficient models of construction, renovation, operation, maintenance[,] and demolition.”<sup>2</sup>

The movement towards environmentally conscious building is expanding at a phenomenal rate. In fact, several Hollywood celebrities have jumped on the “green building” bandwagon. For instance, actor Brad Pitt established Make It Right, a foundation dedicated to building 150 affordable, “green,” storm-resistant homes in New Orleans’ Lower Ninth Ward for families whose homes were destroyed by Hurricane Katrina.<sup>3</sup> In addition, actress Eva Longoria, along with her partners,<sup>4</sup> formed The GreenVille Project, LLC, an eco-conscious, retail development firm with a vision towards building green retail shopping centers.<sup>5</sup>

The private or business sector also joined this movement in an attempt to gain profit, maximize employee productivity, and meet consumer demands in the market. For instance, eco-conscious apartments and houses are attractive to environmentally cognizant consumers, as well as those who wish to simply save money on their utilities. In addition, studies have

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1. In 2007, the U.S. market for green building and services was \$12 billion. USGBC: About USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124> (last visited Feb. 12, 2011). This market is expected to increase to upwards of \$60 billion by 2010. USGBC: About USGBC, *supra*.

2. U.S. Environmental Protection Agency, Green Building, <http://epa.gov/greenbuilding/> (last visited Feb. 12, 2011).

3. Make It Right, Media, <http://www.makeitrightnola.org/index.php/media/> (last visited Nov. 29, 2009). This project was named the “largest and greenest community of single family homes in the world” by the U.S. Green Building Council. Make It Right, Press Releases, [http://www.makeitrightnola.org/index.php/media/press/usgbc\\_at\\_clinton\\_global\\_initiative\\_honors\\_make\\_it\\_right\\_as\\_the\\_largest\\_and\\_/](http://www.makeitrightnola.org/index.php/media/press/usgbc_at_clinton_global_initiative_honors_make_it_right_as_the_largest_and_/) (last visited Nov. 29, 2009).

4. Eva Longoria’s partners are Jae Larsen and Butch Klein. The GreenVille Project, Who We Are, <http://www.thegreenvilleproject.com/who-we-are> (last visited Feb. 12, 2011).

5. The GreenVille Project, *supra* note 4.

shown that employees are two-to-sixteen percent more productive in workplace environments that exhibit green designs and technologies.<sup>6</sup> Another study, on hospitals, revealed that patients in green hospitals were discharged two-and-a-half days earlier than patients in conventional non-green hospitals.<sup>7</sup>

The public and government sectors have also joined the green building movement, recognizing a benefit for sustainability and cost efficiency. In fact, many cities and even some states encourage this movement by giving tax credit incentives and incorporating “green building” standards into their local building code.<sup>8</sup> For example, the State of Illinois recently enacted the Green Building Act,<sup>9</sup> requiring that certain buildings achieve specific green building standards evidenced by LEED, discussed *infra*, or an equivalent organization that rates and certifies projects.

This green building movement is not confined to the large metropolitan cities. With the nationwide focus on reducing our carbon footprint, consumers in medium and even small cities are demanding green products and structures. Currently, the State of Mississippi is at the forefront of the green building movement. On the homebuilder level, Mississippi leads the nation in the number of LEED certified home projects.<sup>10</sup> This, in part, is due to the massive reconstruction project on the Keesler Air Force Base in Biloxi, Mississippi, replacing homes destroyed by Hurricane Katrina.<sup>11</sup> This development, with more than 700 certified home projects, marks the first and largest LEED certified community project in the country on an Air Force Base.<sup>12</sup> Also, in Jackson, Mississippi, the new U.S. Federal Courthouse is registered for LEED certification.<sup>13</sup> This is evidence of the widespread growth of the green building movement.

What is considered a green building is subjective. In fact, there is no single definition of green building. Thus, with this widespread growth, a standard or way of measuring the “greenness” of a building or product is

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6. Caroline Clevenger, LEED, slide 21, <http://www.stanford.edu/class/cee115/wiki/uploads/Main/Schedule/LEED.pdf> (last visited February 12, 2011).

7. Clevenger, *supra* note 6.

8. Other examples are discussed *infra*.

9. Green Buildings Act, 20 ILL. COMP. STAT. 3130/15 (West 2010).

10. Mississippi has 651 certified home projects. California comes in a distant second with 251 certified home projects. USGBC Mississippi Chapter, <http://chapters.usgbc.org/mississippi/> (last visited Feb. 12, 2011).

11. U.S. Air Force, *Keesler's First Energy, Environmental-Friendly Home Certified*, <http://www.af.mil/news/story.asp?id=123112477> (last visited Feb. 12, 2011).

12. U.S. Air Force, *supra* note 11. The Keesler project received an award from the U.S. Green Building Council for its commitment to building homes certified in Leadership in Energy and Environmental Design. The project, which replaced homes destroyed by Hurricane Katrina, consists of 792 out of 1028 homes. Mary Perez, *Construction Nearly Complete at Keesler*, THE SUN HERALD, Feb. 25, 2010.

13. Walter P. Moore, GSA's BIA Pilot Program and LEED Registered, <http://www.walterp.moore.com/projects/government/projectsGovJackson.php> (last visited Feb. 12, 2011).

needed, especially when the “green” feature is used in marketing or advertising. As a result, a number of third-party organizations have formed in an attempt to provide a system or way to rate or compare green buildings.<sup>14</sup>

The front-runner in the green building movement is the U.S. Green Building Council (“USGBC”), a prominent, non-profit organization devoted to educating and facilitating sustainable building.<sup>15</sup> To facilitate the movement towards sustainable living, the USGBC created the Leadership in Energy and Environmental Design Green Building Rating System (“LEED”), a system of “universally understood and accepted tools and performance criteria.”<sup>16</sup> With the lack of understanding of this complex system and the plethora of new and unproven products and designs boasting energy efficiency and sustainability flooding the market, dispute and litigation is inevitable. In fact, the average success rate of projects actually obtaining LEED certification is merely 13.8 percent.<sup>17</sup> However, if parties anticipate potential issues and plan on the front-end, litigation can be avoided.

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14. These rating systems include the following: the National Green Building Program, <http://www.nahbgreen.org/>, Leadership in Energy and Environmental Design, <http://www.usgbc.org>, and Green Globes, <http://www.greenglobes.com/>.

15. About USGBC, *supra* note 1. Approximately 35,000 projects through the United States and ninety-one countries are participating in the LEED rating system. About USGBC, *supra*. For 2009, there are eighty-nine LEED projects in Mississippi. Nash Nunnery, *Cost of Building Green Doesn't Have to be Excessive, Architect Says*, DAILY REP., Oct. 15, 2009, available at <http://dailyreporter.com/blog/2009/10/15/cost-of-building-green-doesn%E2%80%99t-have-to-be-excessive-architect-says/>. LEED is just one of several green building standards systems. Another green building certification system is the National Green Building Standard, which is administered through a subsidiary of the National Association of Home Builders. NAHB – National Green Building Program, <http://www.nahbgreen.org/> (last visited Feb. 12, 2011).

16. U.S. Green Building Council, LEED Committees, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1750> (last visited Feb. 14, 2011). For an interesting article asserting that the LEED system is broken and in need of reform, see Auden Schendler & Randy Udall, *LEED Is Broken . . . Let's Fix It*, <http://www.aspensnowmass.com/environment/images/LEEDisBroken.pdf> (last visited Feb. 12, 2011). This article suggests that while there are many LEED projects in the works, only 167 projects attained certification between the years 2000 to 2005. Schendler & Udall, *supra*. The authors suggest that this lack of certification is due to five problems. Schendler & Udall, *supra*. First, the cost of merely obtaining certification, including increased consulting fees and registration, documentation, and membership costs, makes certification impractical. Schendler & Udall, *supra* (noting, for example, that some developers decided to use the LEED certification checklist but forego certification, using the money they would have spent on certification to acquire additional sustainability features for the project). Second, there is a problem with point inequality—the system allows for greenwashing, a way of “scamming” LEED points without true benefits to the environment. Schendler & Udall, *supra*. Third, while computer energy modeling should translate into a way to gain LEED points, it is complicated and does not always prove accurate. Schendler & Udall, *supra* (noting that after consulting with the USGBC, the authors were told to design their project a certain way; however, upon final review, this order changed, resulting in less points being awarded and costing the project its Gold Certification). Fourth, the “claims of green building benefits are misleading.” Schendler & Udall, *supra*. Lastly, the bureaucracy—arduous documentation and paperwork requirements, length of time, and onerous review process—involved in obtaining certification is impractical. Schendler & Udall, *supra* (describing interactions with the LEED rating system as “stark and clinical as a colonoscopy” with “LEED reviews [feeling] like a Navy SEAL boot camp”). Since the publication of this article, the USGBC implemented online filing to reduce time up to fifty percent. Adobe and the U.S. Green Building Council, <http://www.adobe.com/enterprise/partners/usgbc.html> (last visited Feb. 12, 2011).

17. Ed LeBard, *Why Many Projects Registered for LEED Fail to Lead*, <http://3designconsulting.blogspot.com/2009/12/why-many-projects-registered-for-leed.html> (last visited Feb. 12, 2011).

The purpose of this Comment is to bring attention to the rapidly rising green building industry, the importance of keeping informed as to new standards, and how to provide for protection and risk allocation in an area devoid of caselaw. This Comment begins in part II with an overview of the LEED rating system and process for obtaining certification.<sup>18</sup> Next, in part III, this Comment provides a detailed review of *Southern Builders, Inc. v. Shaw Development, LLC*, the first widely publicized “green building” case. Part IV will discuss two industry-standardized contracts: the new 2007 AIA and the recently released ConsensusDOC 310. In part V, this Comment will analyze risk allocation through contracting and how to avoid disputes by planning on the front-end. Finally, in part VI, this Comment will address minimizing risk through two recently released insurance policies relating to green building.

## II. LEADERSHIP IN ENERGY AND ENVIRONMENTAL DESIGN RATING SYSTEM

Leadership in Energy and Environmental Design (“LEED”) is a third-party, “internationally recognized green building certification [program]” dedicated to “provid[ing] building owners and operators a concise framework for identifying and implementing practical and measureable green building design, construction, operations[,] and maintenance solutions.”<sup>19</sup> Developed by the U.S. Green Building Council (“USGBC”), the LEED green building certification program provides “universally understood and accepted tools and performance criteria.”<sup>20</sup>

LEED is comprised of several individualized rating systems to account for different categories of development, including new construction, homes, and retail projects.<sup>21</sup> For example, the “New Construction Rating System is designed to guide and distinguish high-performance commercial and institutional projects, including office buildings, high-rise residential buildings, government buildings, recreational facilities, manufacturing plants[,] and laboratories.”<sup>22</sup> Buildings in this category are evaluated on seven major impact areas: sustainable sites, water efficiency, energy and

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18. This Comment will focus primarily on the LEED rating system, due to its widespread popularity and the fact that many government units are incorporating LEED standards into their building codes.

19. What LEED Is, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988> (last visited Feb. 12, 2011).

20. U.S. Green Building Council, LEED Committees, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1750> (last visited Feb. 14, 2011); What LEED Measures, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1989> (last visited Feb. 12, 2011).

21. LEED Rating Systems, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222> (last visited Feb. 12, 2011). Other categories include existing buildings operations and maintenance, commercial interiors, core and shells, schools, healthcare, and neighborhood development. LEED Rating Systems, *supra*.

22. LEED for New Construction, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=220> (last visited Feb. 12, 2011).

atmosphere, materials and resources, indoor environmental quality, innovation in design, and regional priority.<sup>23</sup> The project as a whole is evaluated by a point system with each individual category being worth a designated amount of points for a total of 110 possible points.<sup>24</sup> To obtain LEED certification, the project must meet a designated point value depending on the certification level sought.<sup>25</sup> There are four different certification levels: Certified (40-49 points); Silver (50-59 points); Gold (60-79 points); and Platinum (80+ points).<sup>26</sup>

Projects desiring certification must follow a strict process and meet certain standards, such as obtaining the requisite amount of points needed for a specific level of certification. The party designated with the responsibility of managing the certification process must submit an application, pay registration and certification fees, and provide documentation of compliance with the requirements of the rating system.<sup>27</sup> During the design phase, a document detailing the anticipated credit for each item on the appropriate checklist must be filed with the USGBC.<sup>28</sup> Although credits are not awarded until the completion of the project, the USGBC will designate each credit, on the filed document, as either “anticipated” or “denied.”<sup>29</sup> The party designated to manage the certification process will continue filing these credit documents throughout the entire project.<sup>30</sup> Then, a third-party verification determines if the project meets LEED requirements.<sup>31</sup>

The Green Building Certification Institute (“GBCI”) serves as the third-party verifier, administering the certification program.<sup>32</sup> To accomplish this task, the “GBCI[, in turn,] works with nearly a dozen . . . ‘certification bodies’ . . . [that] manage the review process, ascertain a building’s compliance with LEED standards, and determine the level of certification for which they qualify.”<sup>33</sup> “To ensure consistency and quality [among] the certification reviews,” “the GBCI conducts independent audits.”<sup>34</sup>

Upon completion of the project, the GBCI conducts a final review to determine if certification is awarded.<sup>35</sup> This final certification decision can

23. What LEED Measures, *supra* note 20.

24. How to Achieve Certification, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1991> (last visited Feb. 12, 2011).

25. How to Achieve Certification, *supra* note 24.

26. How to Achieve Certification, *supra* note 24. For a more detailed breakdown of scoring and awarding points and certification, see LEED 2009 for New Construction and Major Renovations, <http://www.usgbc.org/ShowFile.aspx?DocumentID=5546> (last visited Feb. 12, 2011).

27. Dale E. Ahearn & Geoffrey M. White, *Understanding and Mitigating the Legal Risks of Green Building*, 2009 WL 1339225, at \*3 (ASPTORE 2009).

28. Ahearn & White, *supra* note 27, at \*3.

29. Ahearn & White, *supra* note 27, at \*3.

30. Ahearn & White, *supra* note 27, at \*3.

31. About GBCI, <http://www.gbci.org/org-nav/about-gbci/about-gbci.aspx> (last visited Feb. 12, 2011).

32. About GBCI, *supra* note 31.

33. The Green Job Bank, The Green Building Certification Institute, <http://www.thegreenjobbank.com/employers/green-building-certification-institute> (last visited Feb. 12, 2011).

34. The Green Job Bank, *supra* note 33.

35. Ahearn & White, *supra* note 27, at \*4.

be appealed to an appeal LEED review board, which makes the final decision.<sup>36</sup> As new innovations, technologies, products, and designs evolve, so do the LEED green building standards.<sup>37</sup> The USGBC develops the standards of the LEED rating system and continuously modifies the requirements with the growth of the green building market.<sup>38</sup>

### III. SOUTHERN BUILDERS V. SHAW DEVELOPMENT

The recent case *Southern Builders, Inc. v. Shaw Development, LLC*<sup>39</sup> exemplifies the problems<sup>40</sup> that may arise, in the context of green building, when parties fail to express their expectations in a clear manner. In this case, Shaw Development, LLC (“Shaw Development”) purchased property and retained Southern Builders, Inc. (“Southern Builders”) to build luxury condominiums.<sup>41</sup> At the same time, the State of Maryland offered a tax credit for projects complying with certain requirements which Shaw Development intended to obtain. Shaw Development entered into a stipulated sum contract<sup>42</sup> with Southern Builders, the general contractor, to develop the entire project for the flat amount of \$6,995,000.<sup>43</sup> The contract made no reference to Shaw Development’s intention to obtain the tax credit.

Before the project was completed, a dispute arose between Shaw Development and Southern Builders, with Southern Builders ultimately filing suit. In response, Shaw Development filed a counter-complaint alleging, among other things, that “Southern Builders breached its contract . . . ‘by failing to . . . construct an environmentally sound ‘Green Building,’ in conformance with the LEED Rating System.”<sup>44</sup> Shaw Development also sought damages for the loss of the Maryland tax credit, resulting from the building’s failure to obtain LEED certification.<sup>45</sup>

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36. Ahearn & White, *supra* note 27, at \*3. The appeal LEED review has the ultimate decision because the USGBC is “an unrelated third party with no contractual duty to . . . the parties.” Ahearn & White, *supra* note 27, at \*3. In addition, the USGBC also expressly disclaims “any liability or responsibility for reliance on the LEED rating system.” Ahearn & White, *supra* note 27, at \*3.

37. LEED 2009 for New Construction and Major Renovations, *supra* note 26, at xi.

38. LEED 2009 for New Construction and Major Renovations, *supra* note 26, at xiii. One scholar suggests that LEED’s nationalized standards (i.e., not taking into account disparities among different locations) hinder certification in smaller markets. Andrew C. Burr, *LEED’s Big Market Bias*, April 23, 2008, <http://www.costar.com/News/Article/LEEDs-Big-Market-Bias/100646> (last visited Feb. 12, 2011).

39. *S. Builders, Inc. v. Shaw Dev., LLC*, No. 19-C-07-011405 (2007).

40. The problems include loss of tax credit, loss of a tenant, loss of business reputation, and loss of profit or a sale, etc. These problems can arise from the failure to meet a party’s “green” expectations or from the failure of new, unproven sustainable-products and designs.

41. Counter-Compl. ¶ 3, *available at*, [http://www.greenbuildinglawupdate.com/uploads/file/Southern%20Builders%20v\\_%20Shaw%20Development.pdf](http://www.greenbuildinglawupdate.com/uploads/file/Southern%20Builders%20v_%20Shaw%20Development.pdf) (last visited Feb. 12, 2011).

42. A stipulated sum contract, also known as a lump sum contract, is an agreement where a “supplier agrees to provide specified services for a specific price.” Construction Contract Types, [http://www.education.nh.gov/program/school\\_approval/ccdm.htm](http://www.education.nh.gov/program/school_approval/ccdm.htm) (last visited Feb. 12, 2011).

43. Counter-Compl., *supra* note 41, at ¶ 4.

44. Counter-Compl., *supra* note 41, at ¶ 24.

45. Counter-Compl., *supra* note 41, at ¶ 25(b).

### A. State of Maryland Tax Credit for Green Building

The State of Maryland, in an effort to encourage green building, provided a green building tax credit of six-to-eight percent of the total cost of the building for projects meeting LEED standards pertinent deadlines, and other specific requirements.<sup>46</sup> To qualify for this tax credit, applicants were required to follow a specific process enumerated in the tax credit program that was similar to the LEED certification process.<sup>47</sup> In this process, the applicant first submitted an Initial Credit Certificate Application to the Maryland Energy Administration (“MEA”).<sup>48</sup> Then the MEA reviewed the application and issued an Initial Credit Certificate, setting forth the maximum amount of credit the applicant could receive<sup>49</sup> and the deadline for obtaining a Final Credit Certificate.<sup>50</sup>

Upon completion of construction and after the applicant received a certificate of occupancy, a LEED-accredited professional inspected the building and then “submit[ted] an Eligibility Certificate to the MEA [certifying] that the building [met all the requirements] necessary to receive the tax credit.”<sup>51</sup> “After reviewing the Eligibility Certificate,” the MEA then issued a Final Credit Certification entitling the applicant to the stated amount of tax credit.<sup>52</sup> In the final step of the process, the applicant attached the Final Credit Certification along with the Eligibility Certificate to its tax return in order to receive the tax credit.<sup>53</sup>

If the applicant failed to obtain the Final Credit Certification by the deadline set forth in the Initial Credit Certificate, the credits set aside for the applicant would expire and revert back to the pool of credits available for new applicants.<sup>54</sup> If this happened, the applicant was required to re-apply to obtain the tax credits.<sup>55</sup> Currently, the MEA no longer accepts applications for tax credits, as all credits have been allocated.<sup>56</sup>

The Shaw Development project failed to meet the LEED criteria within the requisite timeline as required by the Maryland tax credit program, thus causing it to lose \$635,000 in potential tax credit.<sup>57</sup> Because the program is no longer in force, the deficiencies could not be remedied in

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46. Maryland Energy Administration, Green Building Tax Credit, <http://energy.maryland.gov/business/greenbuild.html> (last visited Feb. 14, 2011).

47. Maryland Energy Administration, Green Building Tax Credit: How It Works, <http://energy.maryland.gov/business/howitworks.html> (last visited Feb. 12, 2011).

48. Green Building Tax Credit: How It Works, *supra* note 47.

49. Green Building Tax Credit: How It Works, *supra* note 47.

50. Green Building Tax Credit: How It Works, *supra* note 47.

51. Green Building Tax Credit: How It Works, *supra* note 47.

52. Green Building Tax Credit: How It Works, *supra* note 47.

53. Green Building Tax Credit: How It Works, *supra* note 47.

54. LEED’s First Lawsuit, <http://leedcertification.wordpress.com/2009/12/22/leeds-first-lawsuit/> (last visited Feb. 14, 2011).

55. LEED’s First Lawsuit, *supra* note 54.

56. Green Building Tax Credit, *supra* note 46.

57. Counter-Compl., *supra* note 41, at ¶ 10.



order to obtain the tax credit. As a result, Shaw Development blamed Southern Builders for this loss and filed a claim for breach of contract.<sup>58</sup>

### B. Construction Agreement

Although Shaw Development intended to take advantage of Maryland's tax credit, the contract with Southern Builders did not clearly evidence this desire.<sup>59</sup> The parties to the contract agreed to use the standard AIA Document A101-1997, a document containing no references to green building.<sup>60</sup> As part of the contract, Southern Builders agreed to the addition of a rather vague provision requiring it "to construct an environmentally sound 'Green Building,' *in conformance* with a 'Silver Certification Level according to U.S. Green Building Council's Leadership in Energy & Environmental Design (LEED) Rating System,' as more specifically set forth in the Project Manual and Project Specifications, Division I Section 'LEED Requirements.'"<sup>61</sup>

The Project Manual, prepared by an architect and incorporated into the agreement between the Owner and Contractor, provided no further guidance and simply contained a clause stating that the "project is designed to comply with a Silver Certification Level according to U.S. Green Building Council's Leadership in Energy & Environmental Design (LEED) Rating System, as specified in Division I Section 'LEED Requirements.'"<sup>62</sup> No other information as to requirements or procedures for obtaining Silver Certification, on the part of Southern Builders, appeared in the contract as a whole.<sup>63</sup> Herein lies the problem—vagueness and lack of clarity within the agreement and between the parties. The contract made no mention of Shaw Development's intention to obtain tax credits or any clear language indicating a requirement that Southern Builders achieve actual certification.<sup>64</sup> The contract was also devoid of any liability for failing to achieve certification or for failing to meet the timeline requirements of the Maryland tax credit program.<sup>65</sup>

The case settled out of court before any judicial determinations were made.<sup>66</sup> Although this case provides no guidance from the courts, it does provide a lesson. The moral of the story is that the intentions and responsibilities of the contracting parties must be detailed and explained from the outset, with risk and liability clearly defined and allocated among the parties.

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58. Counter-Compl., *supra* note 41, at ¶ 24.

59. See Counter-Compl., *supra* note 41, Ex. A.

60. Counter-Compl., *supra* note 41, Ex. A at 1.

61. Counter-Compl., *supra* note 41, at ¶ 10 (emphasis added).

62. Counter-Compl., *supra* note 41, Ex. B at 32.

63. Counter-Compl., *supra* note 41, Ex. B.

64. Counter-Compl., *supra* note 41, Ex. B; LEED'S First Lawsuit, *supra* note 54.

65. Counter-Compl., *supra* note 41, Ex. B; LEED'S First Lawsuit, *supra* note 54.

66. LEED'S First Lawsuit, *supra* note 54.

## IV. INDUSTRY STANDARD CONTRACTS

As LEED moves into the mainstream, lawsuits, such as *Shaw Development*, are inevitable. Since LEED certification is dependent upon events throughout the entire project, from design to construction activities, green building provisions aimed at preventing disputes and allocating risks must be taken into account in both the contract between the Owner and Architect and between the Owner and Contractor. Two of the leading construction industry standardized contract companies have developed contract addendums to facilitate the growing trend of green building.<sup>67</sup> However, while on the surface providing a sense of security, a cursory review of these documents reveals that the standardized forms do not extinguish the parties' duty to stay current with new laws, changes in green standards, and advances in technology, and the need to clearly define each party's roles and responsibilities in the construction contract.

## A. AIA Standardized Construction Contracts

The American Institute of Architects ("AIA") contract documents have been recognized as the industry standard for more than 120 years.<sup>68</sup> The AIA has a plethora of standardized forms and agreements addressing various "relationships, project types, and delivery methods involved in design and construction projects."<sup>69</sup> These documents are revised approximately every ten years with the most recent version being released in 2007.<sup>70</sup> As discussed *supra*, the 1997 AIA documents contained no reference to new green building standards.

The problem in *Shaw Development* was the parties' reliance on the 1997 version of the AIA documents. The 1997 documents provided no guidance for the green movement—and thus, without adequate additions by parties, was a cause of the dispute in *Shaw Development*. In 2007, the AIA released a revised version of its standard contract documents containing references to green building and attempting to help facilitate the green building movement.<sup>71</sup> While the new AIA documents may give professionals in the construction industry a sense of security, these documents are still inadequate to address many problems that may arise.

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67. American Institute of Architects, <http://www.aia.org/contractdocs/index.htm> (last visited Feb. 12, 2011); About ConsensusDOCS, <http://consensusdocs.org/about/> (last visited Feb. 12, 2011).

68. American Institute of Architects, *supra* note 67. As of 2007, AIA has faced competition with the formation of ConsensusDOCS, an organization that publishes construction documents comparable to those of AIA. Construction Contracts Built by Consensus, <http://consensusdocs.org/> (last visited Feb. 12, 2011).

69. American Institute of Architects, *supra* note 67.

70. Paul M. Lurie, *Major Changes in the 2007 AIA Documents*, <http://www.aia.org/groups/aia/documents/pdf/aia078762.pdf> (last visited Feb. 12, 2011).

71. The American Institute of Architects, AIA Document Commentary B101 – 2007 Standard Form of Agreement Between Owner and Architect, at 9 <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia076840.pdf> (last visited Feb. 10, 2011).

## 1. AIA B101-2007 Owner-Architect Agreement

The standard agreement between the Owner and Architect, AIA B101, was revised in 2007, and now contains references to green building. As a basic service, section 3.2.5.1 requires an architect to merely “consider environmentally responsible design alternatives . . . .”<sup>72</sup> This provision, however, does not elaborate as to the extent, how much, or what kinds of design alternatives are required. Nor is this language sufficient to hold the architect liable if the design does not comply with LEED standards. In fact, the burden to achieve an “environmentally responsible design [alternative] is not placed solely on the architect [but] is the owner[‘s]” decision as to the extent of the environmental impact required in the project.<sup>73</sup> Further, the commentary to section 3.2.5.1 specifically considers LEED certification an “extensive design alternative[ ]” rising above a “basic service” to be provided by the architect as an “additional service for an additional compensation.”<sup>74</sup> Thus, designing to meet LEED certification does not fall within the basic services of the document, but must be added as an additional service in the appropriate section. Clearly, relying on section 3.2.5.1 alone is not adequate to provide for an Owner’s expectation of a design worthy of LEED certification.

The AIA B101-2007 contract provides optional provisions for additional services, which are beyond basic services and require additional compensation, allowing an Owner to obtain environmentally responsible design services.<sup>75</sup> Section 4 provides a variety of additional services not included within the basic services to be provided only if specifically designated in the contract, with designated responsibility to the architect, and with additional compensation paid by the Owner.<sup>76</sup> Among the additional services in section 4.1 are two provisions relating to green building: section 4.1.23 Extensive Environmentally Responsible Design; and section 4.1.24 LEED Certification (B214-2007).<sup>77</sup> These provisions provide no details or guidelines of the specific task; the Owner must provide a detailed description of the additional services required.<sup>78</sup> AIA Document B214-2007, regarding

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72. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 9.

73. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 9.

74. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 9.

75. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 9, 18.

76. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 18.

77. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 19.

78. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 19. This description may be attached as an exhibit to the document. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 19. Additional services may be added after the execution of the agreement without invalidating the agreement. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 19.

LEED Certification, can be incorporated into the agreement; however, this document does not cover issues “beyond the limits of scope of services definition.”<sup>79</sup> The problem with the revised document is that it fails to address risk allocation, the responsibilities of the parties, and liability.<sup>80</sup>

There are, however, circumstances where obtaining LEED certification may be considered a basic service under article 3.<sup>81</sup> As discussed *supra*, many local governments are incorporating mandatory certification requirements into their building codes. For example, as of March 8, 2007, Washington, D.C. requires that certain building projects obtain LEED Silver Certification.<sup>82</sup> AIA B101-2007 section 3.1.5 requires “[i]n designing the Project, the Architect shall respond to applicable design requirements imposed by such governmental authorities . . . .”<sup>83</sup> Thus, if the building code requires certification at a certain level, the Architect could be required to render a LEED compliant design as a basic service at no additional cost.

Another concern with government-mandated certification is section 3.1.6, which states that “[t]he Architect shall assist the Owner in connection with the Owner’s responsibility for filing documents required for the approval of governmental authorities having jurisdiction over the Project.”<sup>84</sup> From this language, one might interpret this as placing the responsibility on the Architect to obtain and submit the necessary documents needed for LEED certification. Both of these concerns are important due to the costs of achieving certification.

## 2. AIA 101-2007 Owner-Contractor

The standard contract between the Owner and Contractor is collectively AIA Documents 101 and 201 (General Conditions of the Contract for Construction).<sup>85</sup> Unlike the contract between the Owner and Architect, the revised 2007 contract between the Owner and Contractor fails to address any aspect of green building.<sup>86</sup>

Although, while not specifically mentioning green building specifics, the AIA Contractor document does contain specific clauses that, in certain circumstances, may impose a duty upon the Contractor to meet LEED requirements. In the case of building codes or laws mandating LEED compliance, the Contractor may be liable if the project fails to comply. Specifically, the Contractor has a duty to “comply with and give notices

79. Mary Jane Augustine, *Project Owner Strategies for “Greening: Design and Construction Contracts*, 565 PRAC. L. INST. 121, 129 (2009).

80. Augustine, *supra* note 79, at 129.

81. Augustine, *supra* note 79, at 129.

82. Green Building Act of 2006, available at <http://www.dccouncil.washington.dc.us/images/00001/20061218152322.pdf> (last visited Feb. 12, 2011).

83. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 8.

84. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 8.

85. Augustine, *supra* note 79, at 129.

86. Augustine, *supra* note 79, at 130.

required by applicable laws, statutes, ordinances, [and] codes . . . .”<sup>87</sup> as well as bear “appropriate responsibility” and “costs attributable to correction” where the Contractor knows the work being performed is not in compliance with the law.<sup>88</sup>

Absent a mandatory building code or law requiring LEED certification, the AIA document alone is insufficient to provide for an Owner’s green building or LEED certification expectation. Since LEED certification is dependent upon the construction phase of the project, the Owner must modify AIA documents to incorporate green building requirements. Otherwise, the Owner should create a custom contract addressing his expectations in regards to green building, specifically the role of the Contractor and requirements for obtaining LEED certification, such as the level of certification desired.

### B. *ConsensusDOCS Standardized Construction Contracts*

ConsensusDOCS,<sup>89</sup> a relatively new competitor of AIA, “is a coalition of associations representing diverse interests in the construction industry that collaboratively develops and promotes standard form construction contract documents that advance the construction process.”<sup>90</sup> Developed by industry experts consisting of “a coalition of thirty-two leading industry associations representing owners, contractors, subcontractors, designers, and sureties,” the ConsensusDOCS standard construction forms aim to provide a workable and fair contract for all parties involved.<sup>91</sup> Instead of Pro-Contractor or Pro-Owner styled documents, ConsensusDOCS “attempt[s] to fairly. . . allocate risks to the Party in the best position to manage and control [such] risk.”<sup>92</sup> By representing “the best interests of the project rather than a sing[le] party,” the contract provides “better project results and fewer disputes.”<sup>93</sup>

ConsensusDOCS consist of more than ninety contracts and forms covering a wide array of construction projects.<sup>94</sup> Incorporated in these documents is the use of “fill-in-the-blanks” designed to facilitate “productive discussions about how particular risks should be allocated on specific

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87. AIA 201-2007 § 3.7.2.

88. AIA 201-2007 § 3.7.3.

89. For an in-depth discussion about the differences between general ConsensusDOCS and AIA documents, see *General Conditions: A Comparison of ConsensusDOCS and the revised AIA Documents*, <http://www.aia.org/groups/aia/documents/pdf/aia078726.pdf> (last visited Feb. 12, 2011).

90. ConsensusDOCS Procedures, ConsensusDOCS Mission, <http://consensusdocs.org/about/procedures/> (last visited Feb. 12, 2011).

91. About ConsensusDOCS, *supra* note 67.

92. *CONSENSUS GUIDEBOOK 3* (2009), <http://consensusdocs.org/wp-content/uploads/2009/12/310-green-building-addendum-guidebook-with-Border.pdf>.

93. About ConsensusDOCS, *supra* note 67.

94. ConsensusDOCS, *Contracts Catalog*, <http://consensusdocs.org/catalog/> (last visited Feb. 12, 2011).

projects before a contract is finalized.”<sup>95</sup> The documents were also designed so that parties could easily modify terms and provisions accommodating specific project or party needs. Overall, the ConsensusDOCS family of contracts and forms aim to provide a neutral and fair agreement modifiable and usable by all parties in a construction project.

On November 10, 2009, ConsensusDOCS released the construction industry’s “first comprehensive standard contract” form, entitled ConsensusDOCSTM 310 Green Building Addendum (“GBA”), designed to facilitate green building projects.<sup>96</sup> Whether the ultimate objective of a construction project is to achieve a specific level of certification by a third-party rating service (such as LEED), a specific level of building performance, or both, the GBA facilitates green building by addressing unique risks and responsibilities.<sup>97</sup> The purpose of this document is to “advise the owner, set proper expectations, and avoid delays and other legal hassles in the construction of buildings seeking green certification or other sustainable goals.”<sup>98</sup> The GBA is publicized as “mitigat[ing] risk and increas[ing] project success by clearly identifying roles and responsibilities for contractors, designers, owners[,] and others involved in the construction project.”<sup>99</sup>

“The GBA is intended to modify, accompany, and complement pre-existing or contemporaneously prepared design and construction agreements . . . .”<sup>100</sup> Although the GBA was designed for use with other ConsensusDOCS, it also coordinates with AIA contract documents, as well as other non-standard agreements.<sup>101</sup> The GBA is flexible and allows custom tailoring by parties, as well as the ability to supplement an existing underlying agreement making it subject to the GBA’s terms and without altering certain provisions in the underlying agreement.<sup>102</sup>

On the surface, the GBA is more comprehensive than its rival AIA documents.<sup>103</sup> For instance, the GBA contains sections including the following: General Principles, which acknowledge the particular green measures incorporated into the project and affecting the roles and responsibilities of the parties; Definitions, introducing new players, roles, and responsibilities; Green Requirements and Procedures; Green Building Facilitator, addressing this new contractual party, who it is, and the scope of its role; Green Status, such as LEED-certified Platinum; Green Measures, “outlin[ing] the steps to achieve the Green Status”; and Plans and Specifications, which “incorporate the green measures into the underlying

95. CONSENSUS GUIDEBOOK 3 (2009), *supra* note 92.

96. New Standard Document Helps Facilitate Green Building, <http://consensusdocs.org/pressreleases/2009/11/gba/> (last visited Feb. 12, 2011).

97. New Standard Document Helps Facilitate Green Building, *supra* note 96.

98. New Standard Document Helps Facilitate Green Building, *supra* note 96.

99. New Standard Document Helps Facilitate Green Building, *supra* note 96.

100. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 7.

101. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 7.

102. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 7.

103. GBA is more comprehensive in comparison to the AIA documents, which are amended once every ten years to take into account evolving industry standards.

contract . . . .”<sup>104</sup> Section 8 pertains to risk allocation and identifies a number of issues, such as “the role of the contractor during the process, . . . [including] a provision [limiting] the contractor’s responsibility for performing certain [acts], a waiver of consequential damages, . . . a general limitation of liability provision [addressing] the failure to attain the targeted status[,] . . . [and] the failure to receive any intended benefits to the environment.”<sup>105</sup>

The most notable feature of the GBA is the creation of a Green Building Facilitator (“GBF”), which functions to “coordinat[e] the design, construction, and document submissions” necessary for certification.<sup>106</sup> “As long as the GBF is not an in-house employee or staff member of the owner,” anyone, from an architect, engineer, contractor, construction manager, to a third-party consultant, may serve as the optional facilitator.<sup>107</sup> One of the major functions of the GBF, contemplated by the GBA, is the requirement to collect and submit documents necessary for green building certification.<sup>108</sup> The GBA recognizes the GBF’s function, as the coordinator of the certification process, to gather, assemble, and submit reports and documentation supplied by the architect and contractor required for certification, while “emphasiz[ing] that the GBF is not assuming the role of architect . . . .”<sup>109</sup>

At the core of the GBA is article 6, involving green measures. This provision identifies procedures “for all Project Participants to be involved in incorporation of the green measures into the plans and specifications . . . .”<sup>110</sup> Included in this provision is the role of the GBF as the facilitator in achieving the desired green building results.<sup>111</sup> “Advice to the owner, . . . coordination with the architect . . . and contractor, and follow-up measures are [ ] identified . . . ,” such that all Project Participants have knowledge of their responsibilities as well as the GBF’s role.<sup>112</sup>

One construction professional believes that the GBA’s provisions were written “broad enough to include” not only LEED certification, but also other “existing and future green building programs.”<sup>113</sup> This, in part, is due to the GBA’s flexible and modifiable nature giving an outline of issues that need to be addressed at the contracting stage of the project. However, the contracting parties bear the burden of tailoring the contract to clearly and fully define the role of each player and express each party’s expectation.

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104. Matt DeVries, *Hot Off the Press: ConsensusDOCS Releases Green Building Addendum*, <http://www.bestpracticesconstructionlaw.com/articles/project-management/> (last visited Feb. 12, 2011).

105. DeVries, *supra* note 104. For a more in-depth discussion of ConsensusDOCS 310, see CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 1.

106. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 6.

107. Martha L. Perkins, *Green Building Risks: Contractors Must Monitor Green Contracts*, [http://construtoragc.construction.com/mag/2009\\_11-12/dept/0911-65\\_AGC.asp](http://construtoragc.construction.com/mag/2009_11-12/dept/0911-65_AGC.asp) (last visited Feb. 12, 2011).

108. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 9.

109. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 9.

110. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 10.

111. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 10.

112. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 10.

113. DeVries, *supra* note 104.

While the GBA is a better alternative to relying solely on AIA documents, one must take into account the newness of ConsensusDOCS—specifically, the lack of caselaw interpreting the contracts, as opposed to AIA documents in general. Similar to the new green building movement itself, the newness of these documents will take time to test their results in the industry. Parties are also less likely to be familiar with ConsensusDOCS agreements as a whole. There are differences between ConsensusDOCS and AIA documents, so a good understanding of the documents is imperative.<sup>114</sup>

In addition, ConsensusDOCS itself states that the GBA must be modified by the parties for projects on a design-build delivery track.<sup>115</sup> Thus, while the GBA facilitates green building projects, it does not alleviate the need for parties to come together, discuss, and clearly define each party's responsibility and role in the process.

## V. RISK ALLOCATION THROUGH CONTRACTING

The starting point for allocating risk and avoiding disputes begins with contracting. As discussed *supra*, the industry standardized contracts are not sufficient alone to provide for a green building project. As noted, obtaining LEED certification is dependent on collaborative effort from all parties involved. In other words, failing to obtain “certification may not be the fault of any one party.”<sup>116</sup> Thus, it is imperative that parties understand their role and scope of responsibility throughout the certification process. This goal can be accomplished by a number of provisions written into a standardized or customized contract.

### A. *Defining the Expectations of the Parties*

From the beginning, the Owner should set forth its objectives in clear terms, defining any words that may be ambiguous or subjective.<sup>117</sup> For example, terms such as “green building” and “sustainability” can be interpreted differently.<sup>118</sup> To some, “green building” could mean an energy-efficient building or even a building painted the color green.<sup>119</sup> A specific reference to a green building standard, such as LEED Silver, gives a clear understanding of what is expected.<sup>120</sup> This ambiguity is yet another reason

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114. The American Institute of Architects, AIA Document Commentary B101 – 2007 Commentary, *supra* note 71, at 18; MASON EDELMAN BORMAN & BRAND LLP AND STITES & HARBISON, PLLC, OVERVIEW COMPARISON OF AIA V. CONSENSUSDOCS CONTRACTS 1 (2008), <http://consensusdocs.org/wp-content/uploads/2009/12/OConnor-Hinklecomparison.pdf>.

115. CONSENSUSDOCS GUIDEBOOK, *supra* note 92, at 5.

116. Augustine, *supra* note 79, at 140.

117. Augustine, *supra* note 79, at 126.

118. Augustine, *supra* note 79, at 129, 131.

119. Augustine, *supra* note 79, at 131.

120. Augustine, *supra* note 79, at 126.



why organizations, such as LEED, have developed—to provide a standardized measurement, or concrete definition, for facilitating the green building movement.<sup>121</sup>

In *Shaw Development*, the Owner failed to set forth its objective in clear terms.<sup>122</sup> The contract language stated that the building should “comply” with LEED Silver standards.<sup>123</sup> This language, however, did not express Shaw Development’s desire to obtain actual certification or Southern Builder’s responsibility to ensure certification was accomplished in the timeframe required to take advantage of the tax credit.<sup>124</sup> In hindsight, Shaw Development’s expectations are clear, but to Southern Builders, at the time of contracting, they were not.<sup>125</sup>

To avoid the problem in *Shaw Development*, the contract should contain a statement acknowledging whether the Owner does or does not intend to seek LEED.<sup>126</sup> A blanket provision, such as “[t]he Project will be designed[constructed] to achieve LEED Silver Certification,” will likely be troublesome for Architects and Contractors.<sup>127</sup>

For Architects, guaranteeing a specific result, for instance, achieving LEED Silver Certification, could be considered “an express warranty, which [is] excluded from the Architect’s professional liability [ ] policy.”<sup>128</sup> Elevating the Architect’s generally accepted standard of care, the professional skill and care ordinarily provided by Architects practicing in the same or similar locality under the same or similar circumstances, is normally excluded from professional liability insurance coverage.<sup>129</sup> In addition, the LEED certification process involves many steps and factors that are beyond the Architect’s control.<sup>130</sup> For instance, points are awarded by a third-party verifier, who could interpret designs and standards differently than the Architect. In sum, an Architect should not guarantee or agree to achieve a specific level of LEED certification, because a guarantee may result in assuming risks that are not covered by professional liability insurance.<sup>131</sup> Instead, the Architect should agree to a provision acknowledging the Owner’s intent to obtain LEED certification and representing to the Owner that he is knowledgeable in the area of green building, specifically with the LEED rating system.<sup>132</sup>

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121. Augustine, *supra* note 79, at 126.

122. Augustine, *supra* note 79, at 131.

123. Augustine, *supra* note 79, at 131.

124. Augustine, *supra* note 79, at 131.

125. Augustine, *supra* note 79, at 131.

126. Augustine, *supra* note 79, at 132.

127. Augustine, *supra* note 79, at 132.

128. Augustine, *supra* note 79, at 132.

129. Augustine, *supra* note 79, at 132.

130. Augustine, *supra* note 79, at 132.

131. Augustine, *supra* note 79, at 132.

132. For examples of contract clauses for Owners intending to seek LEED certification, see Augustine, *supra* note 79, at 140-47.

A blanket guarantee provision is likewise concerning for Contractors. While Contractors possess the benefit of the Spearin doctrine,<sup>133</sup> which affords Contractors a shield from liability if they build according to the Architect's plans but fail to obtain certification due to the design, Contractors are still responsible for their Subcontractors, building techniques, and materials.

Another problem with Shaw Development's contract provision is that it did not specify the particular version of the LEED rating system to which the project should comply.<sup>134</sup> LEED standards change with new technologies and innovations in the industry. If another version of LEED standards had been adopted during construction, there may have been a dispute if the project failed to achieve certification under the revised standards even though it may have met the old version's standards at the time of contracting. Thus, to avoid confusion, the contract should clearly state the desired version and level of certification to which the project should comply, whether it be a specific version in effect at the time of contracting or the current version in effect throughout the project (i.e., any new version released by LEED before the project is complete).<sup>135</sup>

In the event that the contract provides for certification under the most current version of LEED standards, the parties should determine, at the time of contracting, which party will be responsible for monitoring changes in LEED standards and which party bears the cost of implementing the changes.<sup>136</sup> As discussed *supra*, design, construction, and technology all play a part in the certification process. Thus, it is difficult to predict which party should bear the cost of revised standards at the time of contracting and without knowing what changes will be in effect. For instance, if a revised standard implements changes in design, the Architect may be the party in the best position for absorbing the cost and change. Parties may benefit by including contract provisions specifying that the Architect is responsible for design changes and the Contractor for other changes relative to his role. In addition, the costs associated with changing standards are difficult to predict at the time of contracting. Changes could be minor with relatively small costs or they could call for expensive outlays—for instance, expensive new technologies or techniques. Thus, parties may benefit by capping the amount of additional expenditures or including a provision requiring approval at the time the expense becomes known.

### B. *Defining the Scope of Each Party's Responsibilities*

In order to avoid dispute, parties must clearly understand the scope of their duties.<sup>137</sup> This was yet another problem in *Shaw Development*: the

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133. *United States v. Spearin*, 248 U.S. 132, 136 (1918) (holding "if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications").

134. Augustine, *supra* note 79, at 126, 131.

135. Augustine, *supra* note 79, at 126.

136. Augustine, *supra* note 79, at 140-47.

137. Augustine, *supra* note 79, at 146.

failure to designate each party's responsibility throughout the project.<sup>138</sup> As discussed *supra*, obtaining LEED certification is an ongoing process requiring extensive documentation and compliance from the beginning, at the design stage, through the completion of the project. Thus, contract documents must specify which party will be responsible for overseeing the LEED certification process.<sup>139</sup>

Among the Owner, Architect, and Contractor, the Architect is in the best position to oversee the project and submit needed documentation. Under the AIA documents, the Architect is already under a duty to "advise and consult with the Owner during the construction phase,"<sup>140</sup> visit the site at appropriate stages of construction, "keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and report to the Owner known deviations from the contract . . . and defects and deficiencies observed in the work."<sup>141</sup> Thus, it seems natural that the Architect supervises the entire process. However, it is important to note that, under the AIA document, the Architect is not responsible for the Contractor's failure to perform in accordance with the contract, nor is the Architect required to make an exhaustive or continuous on-site inspection; so, the Owner must insert a provision delegating the responsibility for documentation and compliance to the Architect.<sup>142</sup>

As with a blanket guarantee, an Architect managing the certification process may be excluded from his professional liability insurance.<sup>143</sup> One way to avoid liability is to include a statement on all documents submitted for certification stating that submitting the document is simply "for the satisfaction of this LEED certification process and does not constitute any guarantee or warranty of any work or product."<sup>144</sup>

Another way to prevent this problem and an alternative to the Architect serving as manager is to employ an independent LEED consultant, known as a LEED-accredited professional ("LEED AP").<sup>145</sup> LEED APs are individuals with "a strong depth of knowledge and practical understanding of the LEED Rating Systems," who have passed an exam evidencing this expertise.<sup>146</sup> In addition to expertise, another benefit of a LEED AP is that the parties may be more receptive to an independent consultant. Many times, Contractors and Architects tend to bump heads or otherwise not get along. Having a LEED AP over the Contractor's shoulder to make sure the project complies with green building standards may result in less hostility between parties. Should the Owner chose to employ a consultant,

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138. Augustine, *supra* note 79, at 131.

139. Augustine, *supra* note 79, at 131.

140. AIA B101-2007 § 3.6.1.2.

141. AIA B101-2007 § 3.6.2.1.

142. AIA B101-2007 §§ 3.6.1.1, 3.6.2.2. The Owner should also include AIA document B214-2007 into the agreement.

143. Augustine, *supra* note 79, at 132.

144. Ahearn & White, *supra* note 27, at \*3.

145. Augustine, *supra* note 79, at 134.

146. USGBC, LEED Exam Prep, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2011> (last visited Feb. 12, 2011).

he should enter into a contract with the consultant detailing the consultant's duties and specifying liabilities, as well as insert a provision in the contract between the Owner and Contractor requiring the Contractor to acknowledge and cooperate with the LEED AP.<sup>147</sup>

Regardless of whether the Owner employs a LEED AP or designates the Architect to manage the certification process, the manager should facilitate the certification process.<sup>148</sup> Specifically, the manager should be responsible for registering the project, consulting with the Owner to determine the appropriate level of certification to seek in light of time and budget restraints, developing a strategy or plan for obtaining certification, documenting the design and construction, "seeking credit interpretation rulings" as needed, consulting with the USGB, and assisting the Owner in evaluating Contractors' and Subcontractors' qualifications.<sup>149</sup>

Beyond providing protections in the contract, the most important way to protect oneself and avoid disputes or liability is to keep up to date and educated with the evolving LEED standards and building codes, as well as new and innovative technologies and products. For instance, Contractors must educate their Subcontractors so they understand that certain techniques must be used and substitutions in materials cannot be made or else they may not be in compliance with LEED requirements. Encouraging open communication and cooperation between parties, as well as clearly identifying each participant's responsibilities, will combat the likelihood of disputes leading to litigation.

### C. Allocation and Calculation of Damages

One of the problems in *Shaw Development* was the failure of the parties to allocate or even address potential damages in the event that the project failed to achieve LEED certification. Although Shaw Development claimed loss in tax credit as damages, these damages would likely be disallowed by the court because they were not foreseeable by the parties or from the contract itself. Moreover, the AIA contract used contained a waiver of consequential damages, thus disallowing recovery for the tax credit. This problem could have been avoided simply by inserting a provision into the contract reflecting Shaw Development's intent to obtain the tax credits, thus making them a direct damage.

Beyond the *Shaw Development* case, failure to obtain LEED certification is important because it could cause the Owner to suffer loss of tenants, loss of a sale, increased expenses or even fines if certification is required by local building codes. The issue of damages will be a tug-of-war between the parties. The Owner will want to delete the waiver of consequential damages found in the standard AIA documents. However, the Architect and Contractor will likely object to deleting this clause.

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147. Augustine, *supra* note 79, at 134.

148. Augustine, *supra* note 79, at 135.

149. Augustine, *supra* note 79, at 135.

One scholar suggested inserting the following clauses for calculating damages and limiting liability:

Architect: "Architect shall be liable for all damages, losses, costs and expenses (collectively, 'Damages') incurred by Owner, that arise out of or relate to the failure to obtain LEED Certification for the Project to the extent caused by or arising out of negligence on the part of Architect in the performance of professional services under this Agreement; *provided, however*, that Architect's liability under this Section for LEED-related Damages shall not exceed \$ \_\_\_\_\_ ('LEED Limitation of Liability')."

Contractor: "Contractor shall be liable for all damages, losses, costs and expenses (collectively, 'Damages') incurred by Owner, that arise out of or relate to failure to obtain LEED Certification for the Project to the extent caused by or arising out of negligence in performance of the Work, or failure to comply with the Contract Documents by Contractor or any Subcontractor; *provided, however*, that Contractor's liability for LEED-related Damages under this Section shall not exceed \$ \_\_\_\_\_ ('LEED Limitation of Liability')."<sup>150</sup>

These clauses will likely strike a balance between the competing interests of the Owner, Architect, and Contractor. Architects and Contractors will likely agree to the above clause because it limits their portion of damages to their own negligence or fault. Architects and Contractors also benefit from limiting the amount of damages, because at the time of contracting, potential damages are not easily foreseen or estimated. For instance, in the *Shaw Development* case, if a defective product had caused the failure of LEED certification compliance and thus the loss of tax credit, it may have been more costly to pay the loss in tax credit, \$660,000, than to replace the defective product. In that case, limiting damages would clearly benefit the Architect or Contractor. Owners will favor these provisions because they ensure compensation from the party at fault. However, this clause may still be the source of controversy in litigation, such as allocating fault and calculating damages.

Due to the difficulty in estimating damages and allocating fault, all parties might benefit from the use of a liquidated damages clause. A liquidated damages clause could avoid time, money, and litigation over the calculation of damages. In the *Shaw Development* case, a liquidated damages clause stipulating damages in the amount of the total potential tax credit could have ended a dispute as to the waiver of consequential damages. On the other hand, if obtaining certification costs more to remedy than the specified amount of liquidated damages, the breaching party would be in a better position. Thus, forecasting potential damages is helpful to determine the liquidated damages.

As one can see, allocating and limiting damages are crucial contract provisions. Although the parties have the ability to craft language to meet

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150. Augustine, *supra* note 79, at 145.

their expectations, this language must result from negotiations between parties at the time of contracting.

## VI. RISK MANAGEMENT THROUGH INSURANCE

In addition to allocating risk in the contract itself, parties now have the option to obtain risk management insurance policies. The insurance industry has been slow to react to the green building movement. AIG, however, released the first insurance policy pertaining to green building risks. AIG Risk Management (“AIGRM”)<sup>151</sup> introduced two policies that provide primary casualty coverage for property owners and managers of green buildings: AIGRMGreen Reputation Coverage<sup>SM</sup> and AIGRMGreen Indoor Environment Coverage.<sup>152</sup>

AIGRMGreen Reputation Coverage addresses the unique and increased risks associated with failed green building expectations.<sup>153</sup> In particular, the policy covers negative media exposure and loss of business reputation when, for instance, “a building fail[s] to [live up to] green industry standards.”<sup>154</sup> AIGRMGreen Reputation Coverage provides up to \$50,000 per occurrence and up to \$150,000 aggregate for a crisis consultant to: “manage the event”; “guide and counsel key company personnel”; and “provide a full range of services to mitigate the adverse publicity and restore reputation” and “coverage for defense costs.”<sup>155</sup>

AIGRMGreen Indoor Environment Coverage provides coverage for claims of bodily injury associated with the failure of “[s]pecialized equipment and products that improve air or water quality,” which are “critical to certification.”<sup>156</sup> For example, injury from the use of innovative energy-efficient products potentially could be covered. Whereas, typically, new and specialized technologies are not covered in standard policies.

In addition to this coverage, customers have access to AIG green claims specialists that provide consultation services.<sup>157</sup> Part of the consultation services include “crisis planning and response . . . involv[ing] identifying areas of risk, establishing procedures, training spokespeople, and” learning key crisis conduct.<sup>158</sup> To facilitate crisis management, “AIGRM closely works with the customer’s operating management and legal advisors.”<sup>159</sup>

Although there is no insurance policy covering, specifically, the failure to obtain a specified certification level, the new AIGRM policies provide

151. AIG Risk Management is a division of AIG providing primary casualty products in the real estate industry.

152. AIG Risk Management, *It’s Getting Easier to Be Green*, [http://web.aig.com/2008/arm8543/arm8543\\_AIGRMGreen\\_FS102108.pdf](http://web.aig.com/2008/arm8543/arm8543_AIGRMGreen_FS102108.pdf) (last visited Feb. 12, 2011).

153. AIG Risk Management, *supra* note 153.

154. AIG Risk Management, *supra* note 153.

155. AIG Risk Management, *supra* note 153.

156. AIG Risk Management, *supra* note 153.

157. AIG Risk Management, *supra* note 153.

158. AIG Risk Management, *supra* note 153.

159. AIG Risk Management, *supra* note 153.

an additional safety net for the increased expectations and unintended consequences associated with green building.

## VII. CONCLUSION

Green building is the newest and hottest trend in the construction industry. As with any new product or technology, there is a period of uncertainty as to risks and liabilities followed by disputes and litigation. *Shaw Development* is indicative of the potential problems that may arise when the industry does not react quickly to changes in new building standards. However, disputes, such as *Shaw Development*, may be avoided with clear communication, proper planning, and risk allocation. With the rapid growth and evolving standards in green building, professionals in the construction industry must stay informed and educated as to building codes and green building principles, as well as clearly define each party's expectations to protect their interests.