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LEED Certification Litigation: Emerging Risks

Minimizing Liability Through Green Building Contracts and Effective Insurance Coverage

TUESDAY, DECEMBER 20, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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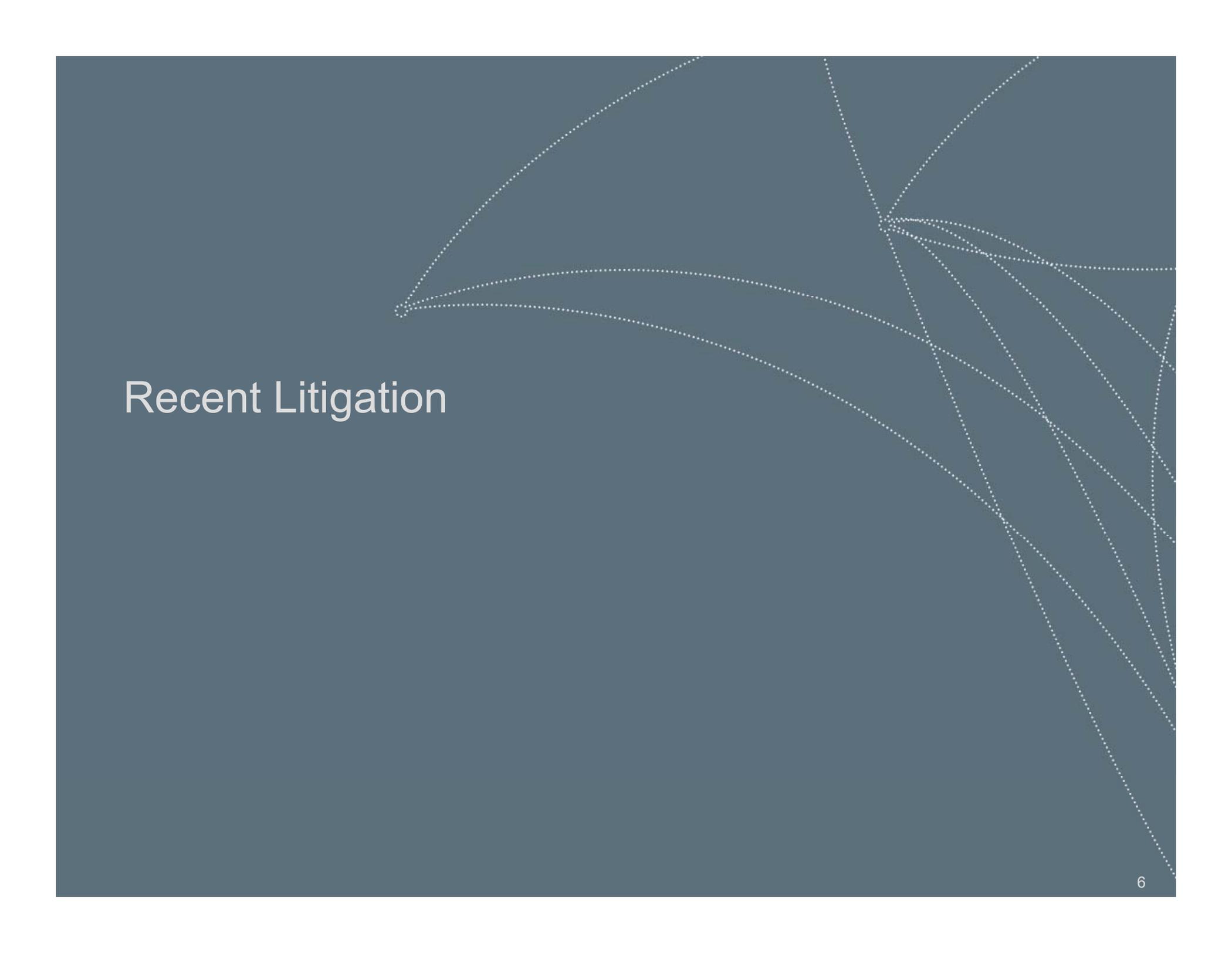
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LEED CERTIFICATION LITIGATION: EMERGING RISKS

Tuesday, December 20, 2011

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The background is a solid dark blue color. On the right side, there are several white dotted lines that form a series of overlapping, curved paths, resembling a stylized leaf or a network of connections. These lines start from the right edge and curve towards the left, with some crossing each other.

Recent Litigation

A. The Chesapeake Bay Foundation, Inc., et. al. v. Weyerhaeuser Company (Montgomery County, MD 2011).

Facts

- Chesapeake Bay Foundation's Philip Merrill Environmental Center.
- First building to obtain LEED Platinum Certification.

Facts (cont'd.)

- SmithGroup (Architect) designed the project.
- Clark Construction Group (General Contractor) built the project.
- Project was to incorporate “recycled and environmentally-friendly construction products.”

Facts (cont'd.)

- Design included a roof truss system with columns and beams that were exposed to the elements.
- The roof truss system, columns and beams were built from parallel strand lumber (parallams).
- Parallams are “green” because they are manufactured from fast growing trees.

Facts (cont'd.)

- Truss Joist MacMillan (a subsidiary of Weyerhaeuser) supplied the parallams.
- After several years of exposure to the elements, the Parallams allegedly began to rot because they had not been properly treated with chemical preservatives.

Lawsuit

- The Foundation, SmithGroup and Clark, settled their differences and sued Weyerhaeuser.
- Claims for “defective, inferior and/or unsuitable building products.”
 - Breach of contract
 - Common law indemnity
 - Contribution
 - Negligent misrepresentation
 - Negligence
 - Damages in excess of \$6 million

B. Condominium Unit Owner v. Riverhouse (New York County, 2010).

Facts:

- Condominium in Manhattan's Battery Park City.
- A LEED Gold Development.
- Unit owner seeks \$1.5 million from Developer for construction defects.

Facts (cont'd.):

- Among other things, the unit owners claim:
 - “The buildings much-heralded ‘green’ heating system consistently fails to provide adequate heat” to their unit.”
- The unit owners further contend that this defective condition “is materially different from those represented by the project sponsor and its principals in the condominium offering plan.”
- Causes of Action: fraud and misrepresentation.

C. Bain v. Vertex Architects (Cook County, Illinois 2010):

Facts:

- Homeowner hired Architect to renovate her home and obtain a LEED Certified Rating (LEED for Homes).
- Complaint states that “the stated objective of the Architectural Contract was to ‘create a sustainable green modern single family home.’”

Facts (cont'd.):

- First cause of action for breach of contract:
 - “[Architect] failed to pursue and obtain for the project certification from the USGBC LEED for Homes Program.”
- Second cause of action claims breach of the construction contract.
- Homeowner seeks damages in excess of \$50,000.

D. Southern Builders, Inc. v. Shaw Development, LLC (Somerset County, Md. 2007):

Facts:

- Waterfront condominium.
- \$6.9 million project.
- Southern sued Shaw for \$54,000 final payment.

Facts (cont'd.):

- Shaw filed counterclaim for contractor's failure to obtain LEED Silver Certification as allegedly required by the contract.
- Contract Requirements:
 - Project manual stated that the project was “designed to comply with a Silver Certification Level.”
- Standard AIA contract was used – A101 owner/contractor agreement.

Facts (cont'd.):

- This Agreement does not actually specify which party is liable for failure to obtain LEED Certification or tax credits.

- Damages:
 - Shaw sought \$1.3 million in damages, including \$635,000 for lost tax credits under Maryland's Green Building Incentive Program.

- Case settled out of court in 2008.

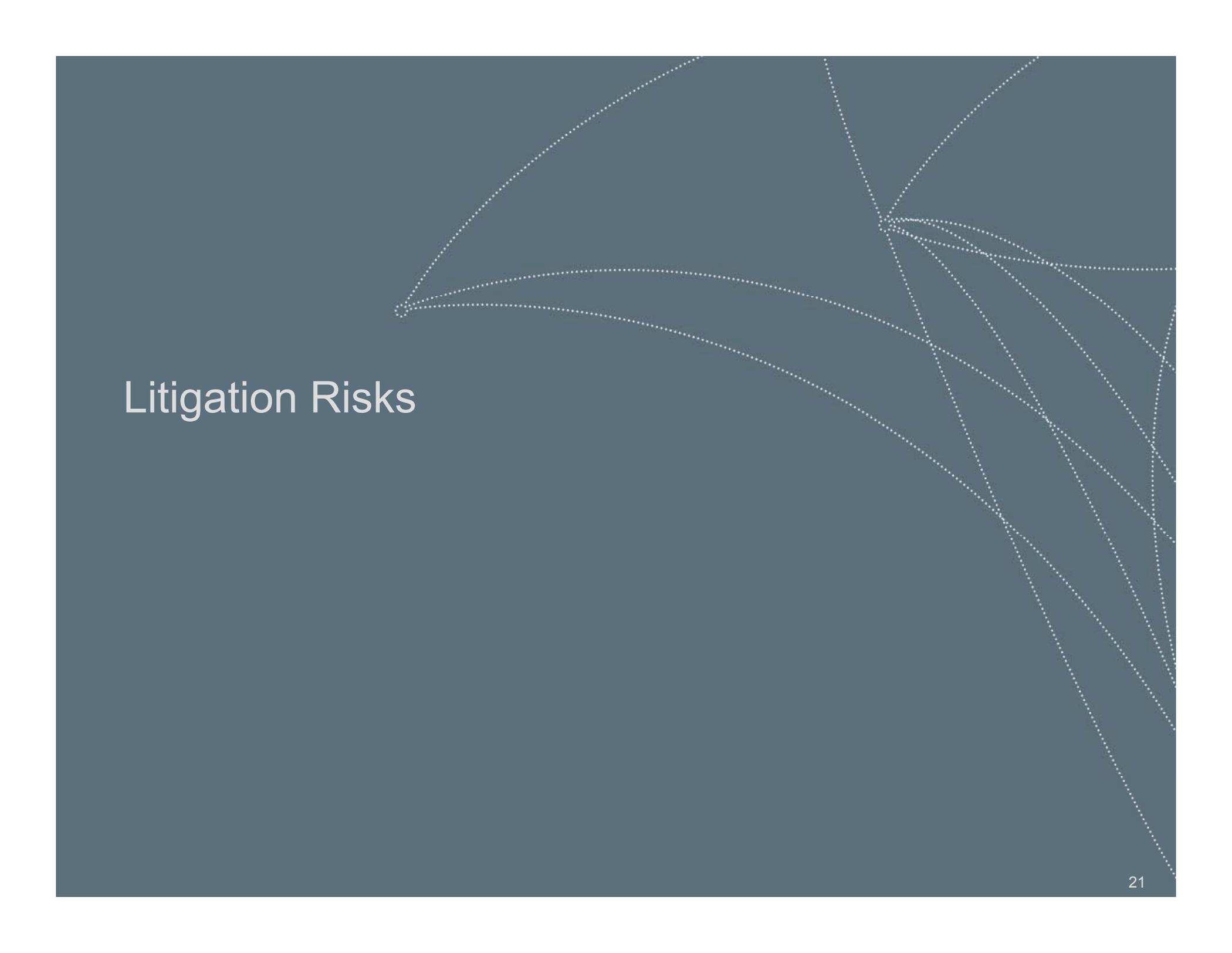
E. Northland Pines High School:

Facts:

- First published discussion of USGBC/GBCI's Certification challenge policy.
- \$28.5 million public school project.
- LEED Gold Certification (2006).

Facts (cont'd.):

- Area residents filed a complaint with USGBC claiming Northland Pines failed to meet Gold Standard Requirements.
- Re-examination was conducted in 2009.
- USGBC upheld its certification (allowed the project team to retroactively amend documentation and retain its LEED Gold Rating).



Litigation Risks

Types of Litigation Risks Based on Cases Brought to Date

4 Categories:

- (1) Materials Litigation
 - Chesapeake Bay
- (2) Sales Representation Litigation
 - Riverhouse
- (3) Litigation for failure to obtain LEED Certification
 - Bain
 - Shaw Development
- (4) Administrative Type Actions
 - Northland Pines

Types of Litigation Risks Based on Cases Brought to Date (cont'd.)

As Owners, Contractors and Architects, you should be primarily concerned with Categories 1, 2 and 3.

(1) Materials Litigation

- Hundreds of Green Building Products on the market.
- All such products proclaim their “green” attributes.
- Although they may be “green,” they may not actually perform.

(2) Sales Representation Litigation

- Sales representations concerning LEED Certification and “green” attributes of homes and condominiums are often made by builders and developers.
- If those representations are not true or not accurate, litigation can be brought by a disgruntled purchaser.

(3) Failure to Obtain LEED Certification

- Owner/Developer contracts with Architect and General Contractor for a LEED Certified Building.
- If LEED Certification is not obtained, Owner/Developer may sue.

Causes of Action Common to All Types of Litigation (Categories 1, 2 and 3)

The Standard Claims:

- (1) Breach of Contract
- (2) Breach of Express and Implied Warranties
- (3) Negligence
- (4) Misrepresentation
- (5) Fraud and Consumer Fraud
- (6) Lanham Act Claims

Some Not So Common Twists:

- AIA Code of Ethics and Standards now requires "the institute and its members to become experts in sustainability" (2008)
- Section 5 of the FTC Act prohibits deceptive acts and practices in or affecting commerce
- FTC has issued "Guides for the Use of Environmental Marketing Claims," commonly known as the "Green Guides."
- The Green Guides provide direction as to what types of claims are considered deceptive

Some Not So Common Twists (cont.'d):

- FTC's Green Guides and their affect on potential liability
 - Vague, general claims
 - Unsubstantiated claims
- Deceptive and misleading
- FTC Regulations/ "Green Guides" could be used as a "standard"/"measuring stick" in private causes of action.

For Example:

- TC Tech. Management Co. v. Geeks on Call America, Inc., 2004 WL 5154906 (E.D. Va. 2004)
- Florida Auto Auction of Orlando, Inc. v. U.S., 74 F.3d 498 (4th Cir. 1996)
- Rodopoulos v. Sam Piki Enterprises, Inc., 570 So.2d 661 (Ala. 1990)

For Example (cont'd.):

- In each case, court held that FTC regulations created a "standard of care" against which a defendant's conduct could be measured for purposes of determining whether defendant made a negligent statement or may have engaged in fraud.

Risks To Developers

- Failure of project to obtain LEED certification
- Failure to obtain tax credits/breaks
- Failure to meet loan or incentive program requirements

Risks To Developers (cont'd.)

- Increased costs due to delay in obtaining LEED Certification
- Failure to comply with marketing claims/promotional materials
- Loss of energy savings
- Loss of reduced operating costs

Risks To Contractors

- Failure to deliver pursuant to terms of contract
- Higher risk of construction defects
- Higher repair and replacement costs
- Failure of structure or system to perform over life cycle of building

Risks To Contractors (cont'd.)

- Exclusions from insurance coverage or more costly insurance
- Delay risks (obtaining materials, inspections, permits, increased paperwork)
- Installation risks

Risks to Design Professionals

- Higher standard of care (AIA B214-2007-LEED Addendum) (places significant responsibility on Architect)
- Risks associated with failure to keep records and file forms required to obtain LEED Certification
- Failure to obtain LEED Certification

Risks to Design Professionals (cont.'d)

- Failure to obtain performance goals
- Exclusions from insurance coverage or more costly insurance

Greater Risk of Consequential Damages

- Loss of Good Will
- Lost sales
- Loss of higher rents
- Lost market opportunities
- Diminution of market value

LEED Certification Litigation: Emerging Risks

Owner and Contractor Perspective

**Tuesday, December 20, 2011
1:00 p.m. – 2:30 p.m. EST**

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I. Understanding the LEED process

a brief overview before you use industry forms for green building

Know the process before you draft.

- In the most basic sense, a green building, or a green lease for that matter, incorporates ecologically sustainable construction and development and management principles to ensure that a building's ongoing operation and maintenance minimizes environmental impact. More specifically, a green building is designed, constructed and operated to achieve, and a green lease addresses, sustainability related to energy and water efficiency, minimizing the use of non-renewable resources, improved indoor environmental quality, alternative transportation methods, reduction of construction waste, and recycling measures.
- In the most generic of terms, when an Owner decides to attempt a green building certification and has decided upon its objectives (energy savings, improved interior environment, and so on), it works with its Architect, engineer, designer or consultant on a green building project checklist summarizing the various green building credits it wishes to obtain. A Checklist and a Responsibility Matrix are included in the Appendix to this presentation.

- During the initial planning process, the Owner, Architect and/or LEED consultant determine, based on the applicable LEED track for certification, the number of points and type of certification, certified, silver, gold and platinum that will attempt to be obtained in connection with the project.
- Project plans and specifications are developed and include protocols for design and operations (for example, for recycling, green cleaning, maintenance), which are intended to qualify for these credits.
- The project is registered with the certification body and design plans sometimes can be submitted to the certification body for early review.
- Even before the project is underway, Contractors and maintenance personnel must be involved in, and buy into, the green building process to assure that the protocols are followed and not accidentally sabotaged in construction and operations. Often this requires diligence by the project manager, consultant, Owner, Architect, Contractor, and operations and maintenance personnel.

- Detailed evidence of green building standard compliance (down to receipts for materials) is compiled and submitted for certification. Sometimes credits are disputed, appealed or lost, and changes need to be made in order to attain the desired certification.
- Three to six months is typical for final LEED certification – although you may be able to accelerate final certification with expedited service and it could take up to nine to twelve months to obtain certification.
- Potential de-certification of LEED status for failure to file energy performance reports or other failures to satisfy or continue to maintain minimum project requirements if possible.

II. Current And Future Point System

A. Current LEED Rating System V3 LEED 209

Ratings are now determined based on a 110-point system – 100 points, plus 10 potential bonus points – five potential points for Innovation and Design (only 3 are available for exemplary performance) and five potential points for regional priority. The point thresholds are higher – more points are needed to reach each level of certification, however, I understand that the percentages of v2.2 to v3, otherwise known as LEED 2009, remains the same.

The number of points the project earns determines the level of LEED Certification the project obtains. LEED certification is available in four levels: Certified, Silver, Gold, and Platinum:

| Certification Level | Version 2.2 Point Range | 2009 Point Threshold |
|---------------------|----------------------------|-------------------------|
| Certified | 26-32 | 40 |
| Silver | 33-38 | 50 |
| Gold | 39-51 | 60 |
| Platinum | 52-69 | 80 |

| Point Category | Prerequisites | Possible Points |
|------------------------------|----------------------|------------------------|
| Sustainable Sites | 1 | 26 |
| Water Efficiency | 1 | 10 |
| Energy & Atmosphere | 3 | 35 |
| Materials & Resources | 1 | 14 |
| Indoor Environmental Quality | 2 | 15 |
| Innovation in Design | | 5 |
| Regional Priority Credits | | 5 |
| Total Possible Points | | 110 |

B. USGBC Releases Draft Version of LEED 2012 for Public Comment

On November 8, 2010, the USGBC released a draft of the next version of its LEED Green Building Rating System, referred to as LEED 2012. The new draft includes changes to all LEED rating systems, including LEED for New Construction, Existing Building Operation and Maintenance, Homes and Neighborhood Development, among others.

According to USGBC, LEED 2012 seeks to address several issues, including aligning the credits across rating systems more uniformly, and attempting to bridge the gap between projected and actual building performance by encouraging expanded reporting of utility performance and expenses and focusing on operations. To that end, LEED 2012 includes specific prerequisites and credits for water metering, advance water metering and building-level metering.

The most significant changes are:

- The rating system begins with a new “Integrated Process” category;
- Includes a new “Location and Transportation” category that collects location-related credits from LEED-NC with others from LEED for Neighborhood Developments; and
- A new “Performance” category which includes commissioning credits along with a handful of new measurement in reporting prerequisites and credits.

According to USGBC, the first public comment period was open from November 8 through December 31, 2010, and a second public comment period is expected to run from July 1 through August 1, 2011. The projected date for release of LEED 2012 is November 7, 2012, but this date may be pushed back.

DESIGN PROFESSIONAL'S PERSPECTIVE AND INSURANCE COVERAGE ISSUES

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- LEED contemplates an integrated, cooperative effort with all project participants working together through shared responsibilities to achieve common goals and objectives.



However, if things go wrong, design professionals should assume that they will be the focus of the blame.



- LEED projects:
 - (a) pose new litigation and liability risks
and
 - (b) present the potential of exacerbating recognized risks of any project.

“ [T]he architect’s response should be similar to what it has been historically. **Educate the client, don’t advocate** to a client unless it is fully transparent as advocacy, and remember that a client expects to be given objective counsel. **Document the process and the decisions.** Make certain the client has realistic expectations relative to what the architect can likely deliver. **Don’t over-promise.** Make certain marketing materials and statements are consistent with capabilities. Understand the products you recommend or specify, along with any manufacturer’s warranties. **Be cautious of new materials** that lack a track record. Question the manufacturer’s specifications and prototype testing results. **Don’t make representations** regarding products or performance that could be considered a warranty. **In short, do all of the things the architect would normally and should normally do on any project.”**

-Frederick F. Butters, FAIA, Esq. “Greening the Standard of Care: Evolving Legal Standards of Practice for the Architect in a Sustainable World” Real Estate Issues Vol. 33, No. 3, 2008.

New risks from LEED include:

- Increased expectations of building performance;
- Increased standard of care;
- Express, implied or inadvertent warranties and guarantees both through contract documents and project documents such as submittals, LEED letter templates, etc;
- Certification failure - lost tax credits, government incentives, decreased/lost return on investment, code and/or zoning issues, increased financing and/or insurance costs, risk of negligence per se, etc;
- Failure of traditional insurance products to cover LEED-specific losses.

Traditional risks – exacerbated or affected by LEED include:

- Delays (Owner and Contractor delays);
- Cost overruns;
- Product or system failures or defects: design v. workmanship;
- Failure to adequately supervise, manage or administer the project (if within the services provided);
- Means and methods v. design;
- Material selection - satisfying owner's aesthetics within owner's budget, on-schedule without adversely affecting LEED points (while using new, novel and/or untested products, systems, materials, etc).

Understanding Owner Expectations and Priorities

- At the outset of the project, the design team (and all project participants) should clearly understand why the owner is seeking LEED certification and the owner's priority of objectives
- Efficient performance? (e.g., reduced energy and water)
- Tax credits or other financial incentives? (e.g., *Shaw*)
- Zoning or building code requirements?
- Institutional requirements? (e.g., GSA, universities, etc)
- Lending requirements or incentives?
- Marketing of a “green” building?

Managing Owner Expectations

Ethical codes and guidelines of the AIA, NSPE, ASCE and ASLA all address “sustainability” and encourage design professionals to consider and/or promote “sustainable design.”

AIA B101-2007, §3.2.5.1 and B201-2007, §2.2.5.1 state that “[t]he architect shall consider environmentally responsible design alternatives, together with other considerations based on program and aesthetics, in developing a design that is consistent with the Owner’s program, schedule and budget for the Cost of the Work. The Owner may obtain other environmentally responsible design services under Article 3.”

Although these provisions place new responsibilities on architects that may raise the applicable standard of care, they also present the opportunity to manage owner expectations.

Documenting Owner Expectations, Communications and Decisions Concerning “Sustainable Design”

Important to document:

- Owner's *understanding* of the inherent risks and limitations of LEED; and
- Owner's *acknowledgement and acceptance* of risks and limitations of LEED.

These include:

- Potential for increased initial design and construction costs with no guaranty of decreased operational, maintenance or life-cycle costs over time;
- Increased risk of construction delays/delayed occupancy;
- Use of new, novel and/or untested products, materials and systems present increased risk of product failure;
- Actual building performance is subject to factors outside the Design Professional's Control, including but not limited to the Owner's use, operation and maintenance of the completed project;
- Achieving LEED certification is also subject to factors beyond the Design Professional's control: LEED is subject to interpretation by USGBC, on USGBC's timeline, with no assurance or guaranty that any particular level of certification will be achieved if the project is constructed in accordance with the project's plans and specifications (cf. typical permitting scheme).
- Certain LEED points are reliant upon or affected by Contractor's means and methods.

LEED vs. “Designing to LEED” or “LEED light”

- “New” exposures presented by LEED and expense and time of LEED registration and certification process have led many to consider “designing to LEED” - that is, building to LEED guidelines without seeking LEED certification - to minimize costs to Owner and exposure to design team and/or contractor.
- Risks to Owner of “LEED light” - less assurance of compliance to LEED principles (however, engagement of CxA could reduce or eliminate these risks); potential that zoning, building code or other regulatory requirements (or institutional requirements) may not be met or could require LEED certification in future; potential that lack of LEED certification may reduce ROI (e.g., less marketable).
- Risks to Architect/Design Team - while risk of certification failure is eliminated, lack of third-party certification increases exposure to design defect claim (e.g., plaintiff design expert).
- Benefits of “LEED light” - reduces bureaucracy, facilitates quicker and less expensive project delivery, eliminates compliance with MPRs and eliminates risk of de-certification.

Role of Commissioning Agent/Authority

- Engagement of an independent Commissioning Agent (CxA) will reduce Architect's exposure to liability for a LEED project (unless CxA is a subconsultant of Architect)
- LEED requires certain fundamental building commissioning focused on mechanical and HVAC systems (LEED 2012 proposes enhanced fundamental commissioning)
- CxA should be engaged at preliminary phase of project. Scope of responsibilities should extend through design, construction, substantial completion and 8-12 months post-occupancy.
- Role of the CxA is not only to verify and document proper installation and initial operation of building components but also to be "handoff" contact with Owner regarding O&M - is Owner's "point person" on how to run the building once occupied.
- CxA is typically "money well spent" for Owner.
- See GSA Building Commissioning Guide:
- <http://www.wbdg.org/ccb/GSAMAN/buildingcommissioningguide.pdf>

Communications to/with Owner:

- “In pursuing LEED certification, the Owner acknowledges and understands that the Design Professional makes no warranties, representations or guarantees that any level of LEED certification will be achieved or that any energy, water or life-cycle cost savings will be achieved or realized.”
- “The Owner acknowledges and understands that the performance of LEED certified buildings may vary due to factors including but not limited to building type, use, location, climate zone and level of certification.”
- “The Owner acknowledges and understands that in pursuing LEED certification, the Design Professional makes no warranties, representations or guarantees, express or implied, regarding the environmental quality or performance (environmental or otherwise) of the completed project.”
- The foregoing should be incorporated into the contract (e.g., sustainable design section and/or via addendum).
- May also be prudent to document specific LEED points being pursued and those not pursued (particularly where Owner chooses/directs not to pursue specific points that could conceivably be achieved - e.g., if such points are not compatible with Owner’s aesthetics, budget and/or schedule).

Refining and Defining Scope of Liability Risks

- Standard of Care
- Damages
- Insurance Requirements
- Dispute Resolution
- Defining and Delineating Roles and Responsibilities of Project Participants

Standard of Care

- AIA B101-2007, §2.2 incorporates the locality rule stating, “[t]he Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.”
- Other provisions affecting standard of care include those addressing sustainable design and substitutions.

Standard of Care

- Added to these provisions should be language documenting that the design professional makes **no representations, warranties or guarantees**, express or implied, with respect to services rendered and/or performance of the completed project.
- In addition, the contract should make clear that the **Design Professional shall not be responsible for Owner directed substitutions and/or design changes/revisions made without the Design Professional's approval** (and/or over objections) and, ideally, providing that the Owner will defend and indemnify the Design Professional against claims, demands, losses and/or damages arising from such substitutions, changes and/or revisions.
- Sustainability section should be revised to document that the Design Professional **not only "considered" but communicated/discussed "environmentally responsible design" options/alternatives** and the risks and limitations associated thereto with the Owner and that the Owner acknowledges and accepts such risks. Sustainability section should also incorporate disclaimer of warranties and standard of care (locality rule) even where addressed elsewhere in the contract.
- Consider provision whereby Owner agrees that failure to achieve any level of LEED certification shall not be considered negligence per se.

Damages

- The Design Professional should seek to refine and limit the scope of potential liability through disclaimers, waivers of consequential damages and limitations of liability including:
- Disclaimer of warranties: e.g., “The Design Professional makes no warranties, representations or guaranties, express or implied, with regard to the services performed or the completed project.”
- Also incorporate specific disclaimers regarding LEED certification, building performance, etc.

Damages

- Mutual waiver of consequential damages: The waiver should not merely refer to “consequential damages.” Rather, it should expressly identify certain damages included within the waiver, e.g. “including but not limited to loss of use, loss of profits, loss of income, lost rents, loss of reputation, decreased return on investment, increased financing costs, increased insurance costs, unrealized savings or diminution of property value.”

Damages

- Waiver of consequential damages should also state that it applies regardless of the cause of action pursued, e.g., “The foregoing mutual waiver of consequential damages shall apply to any cause of action including but not limited to negligence, negligence per se, strict liability, breach of contract and/or breach of warranty.”
- Seek limitation of liability to set outer limit of risk, e.g., limit liability to amount of Architect’s fee or limits of insurance coverage (limit of liability and valid and collectible insurance may best reduce exposure).
- Note: Liability for intentional torts generally cannot be waived (e.g., fraud).

Damages

- Seek defense and indemnity from Owner for claims by general contractor, subcontractors and/or any other project participants not engaged by Architect.
- Liquidated damages may effectively set definable outer limit of liability (but may also implicate insurance coverage issues).

Insurance Requirements

- AIA B101-2007, §2.5 and B102-2007, §1.5 set forth insurance requirements and require the Owner to reimburse the Architect if such requirement exceed the levels the Architect normally maintains.
- Should also seek to have the Design Professional(s) named as additional insured(s) to the Contractor's CGL coverage, e.g., revise A201-2007, §11.1 to include "Architect and Architect's Consultants."

Dispute Resolution

- The 2007 AIA documents deleted the mandatory arbitration provisions contained in the 1997 documents and, instead, provide a “check the box” approach, with litigation as the default if no dispute resolution process is checked.
- Indicative of the trend away from arbitration due to associated costs as well as other perceived drawbacks such as lack of evidentiary and/or procedural rules and rights (e.g., rules of evidence, discovery rules, summary judgment, appeal, etc.) and ill-defined legal standards.

Dispute Resolution

- In considering proposed dispute resolution process, weight should be given to status and relative bargaining power of Owner - e.g., whereas litigation may be preferable as between equals, arbitration may be preferable where Owner is governmental entity, religious institution, educational institution, etc.
- Jurisdiction/venue where litigation would/could proceed also must be considered - at a minimum, should seek forum selection clause to avoid "worst of the worst" if possible.

Dispute Resolution

- If arbitration is specified, may be prudent to specify where arbitration is to be filed and conducted, governing law, rules of evidence apply, discovery allowed, etc.
- 2007 AIA documents retain provision requiring mediation as a condition precedent to arbitration or litigation.

Dispute Resolution

- 2007 (and 1997) AIA documents also contain provisions addressing contractual limitations period and governing law.
- e.g., B101-2007, §8.1.1 and B102-2007, §4.1.1 specify that dispute resolution proceedings be initiated “within the period specified by applicable law, but in any case not more than ten years after the date of substantial completion of work.”
- e.g. B101-2007, §10.1: governing law is “the law of the place where the Project is located” except the FAA applies to arbitration.

Defining and Delineating Roles and Responsibilities of Project Participants

- Document which points are being pursued and which LEED points are not being pursued
- Document *what* each party is supposed to do, *when* they are supposed to do it (e.g., site visits, progress reports, submittal and approval of/response to RFIs, submittals, substitutions, etc.) and *how, when* and *in what form* it is to be documented.
- Include a LEED “scorecard” or matrix in contract/contract documents.
- Include a sample LEED letter template in contract/contract documents.
- Designate responsibility for record maintenance and identify which sets of records are critical path for certification.

Defining and Delineating Roles and Responsibilities of Project Participants

- Set schedule for project meetings, or “Charrettes,” including pre-design and pre-construction meetings/workshops.
- Clarify which consultants are under Architect’s umbrella and which are engaged by Owner, Contractor or others (e.g., Commissioning Authority, LEED consultant).
- Consider using AIA B214-2007 or ConsensusDOCS 310 - Green Building Addendum.

Defining and Delineating Roles and Responsibilities of Project Participant

- AIA B214-2007 - LEED Addendum.
- Addendum to Owner-Architect Agreement which applies only to LEED certification and not other green certification systems; places significant responsibilities upon Architect.
- Architect's Services include: pre-design workshop; preparing LEED certification plan, specifications and final report; organization, management and submittal of certification documentation; contract administration services and services during bidding phase.

Defining and Delineating Roles and Responsibilities of Project Participants

- ConsensusDOCS 310 sets forth a more formalized process which attempts to better clarify roles of Contractor and Architect and utilizes a “Green Building Facilitator” (“GBF”) who is answerable for failure to achieve certification (may be architect, engineer, contractor, CM, etc. as long as independent of Owner).
- ConsensusDOCS 310 contemplates that the Owner and GBF have collaborated to determine Owner’s objectives and program subject to a separate contract.
- Intended to be appended to all other project contracts so that all project participants are aware of each other’s roles and responsibilities.

Defining and Delineating Roles and Responsibilities of Project Participants

- ConsensusDOCS 310 appears more uniquely tailored to green building certification (LEED or otherwise) and, therefore, may be preferable to certain clients and/or for certain projects. On the other hand, AIA B214-2007 sets forth a workable framework for LEED projects and may be preferable for certain clients who are more comfortable with it given that its form and content is more in-line with existing AIA forms, particularly if Architect intends to perform all services set forth therein.

Other Comments and Considerations

- Design v. Performance specifications: *Spearin* doctrine does not apply to performance specs.
- Project Delivery: Design-Bid-Build not optimal (but may have no choice, e.g., public contract).
- Fixed price and fast-tracked projects not optimal - increased risk of cutting corners.
- Understand manufacturer warranties and their limitations - warranty likely covers only replacement and not consequential damages (and is only as good as the company warranting the product).
- Know all penalty provisions of GC's contract (e.g., LDs for late completion).
- Recognize realities of construction industry: trades that typically may not be subject to much oversight/scrutiny during performance may be critical to establishing certain LEED points (e.g., painters, drywall, carpet installers, waste haulers, etc.); GC, subs and Owner need to be educated/aware (and vigilant in managing the project properly).

Other Comments and Considerations

- Means and Methods: Construction phase LEED points may be reliant or affected by Contractor means and methods, particularly MR and IEQ points (e.g., Construction Waste Mgmt., Construction IEQ Mgmt. Plan) which address sequencing, protective measures, documenting performance and/or obtaining proper documentation from vendors/suppliers. Architect should recognize risk of blame for missing these points (e.g., site visits and observation = duty to inspect and ensure work done properly) and emphasize to Owner, GC and subs that this goes to means and methods and is not Architect's responsibility. Also prudent to document that Owner acknowledges and understands this and chain of command/lines of communication (e.g., Architect-Owner, Owner-GC-sub).
- Understand the risk of certification failure - **if LEED certification is missed, someone has to pay** - and price it into the contract.
- Note: pricing structure where LEED certification results in a "bonus" to Design Team, GC and/or subs may be optimal risk management tool if feasible given time lags, code/zoning issues and other practical realities.

Liability Insurance

- Major Coverage Concerns Include:
- Losses for certification failure = breach of uninsurable warranty or guaranty;
- Contractor's liability excluded by Professional Services Exclusion;
- Other coverage exclusions and/or defenses may apply to certain losses;
- Project participants have insufficient coverage or inadequate risk management in place.

Note: Limiting damages to amount of valid and collectible insurance coverage should reduce or eliminate exposure for uninsured risks. Moreover, having an independent CxA may comfort Owner that he will not be left "holding the bag" if there are problems with certification or performance.

Liability Insurance

- Warranties and Guarantees: Careful contract drafting can help reduce these risks, e.g., disclaiming warranties and guarantees (not foolproof but serves as reference point).
- Argo Insurance Brokers offer a Sustainable A&E Professional Liability Program which is silent on warranties and guarantees (i.e., not excluded but not expressly covered).

Liability Insurance

- Professional Services Exclusion: LEED contemplates that non-professionals (e.g., GC and/or subs) may perform services that may be deemed “professional;” if liability arises out of such services, may be excluded.
- Attempt to reduce risk through contract drafting.
- Require GC to maintain professional liability coverage (if feasible).
- Pay attention to deductible and retention amounts (if any) and “drop down” language (if any).

Liability Insurance

- Other coverage issues include: losses are not “damages” or “loss” covered by the policy; intentional acts/fraud exclusions; mold/fungus, EIFS exclusions, losses not ones for which insured is “legally obligated to pay;”
- GL specific: trigger; lack of an “occurrence;” PL exclusion; contractual liability exclusion; work-product exclusions; impaired property exclusions, etc;
- PL specific: losses do not arise from performance of “professional services” (Argo Sustainable A&E PL policy has expanded definition of “professional services”); claims made/claims made and reported coverage; eroding policy limits

Liability Insurance

- Managing professional risks: Inexperienced and/or unsophisticated professionals (e.g., newly minted APs without construction experience) may not recognize requirements of claims made and particularly claims made and reported coverage (e.g., need to timely notify insurer of claim or facts and circumstances) - may control this risk by preparing RFP for LEED agents, CMs, CxAs, etc and/or participating selection process.
- Eroding policy limits have significant effect on recoverable insurance proceeds if claim goes to litigation, arbitration or otherwise triggers “defense costs” or “claim expenses,” particularly on high-end/high value projects.

Liability Insurance

- Additional Insured Coverage: Contractor should include Owner (and, ideally, Architect and Architect's consultants) as additional insureds for CGL coverage and, at a minimum, require subcontractors to name Contractor as additional insured to subcontractors' CGL policies.

Builder's Risk and Property Insurance

- Owner and Contractor should maintain sufficient Builder's Risk and Property Insurance during construction.
- Wider variety of insurance products (purportedly) aimed at coverage "green" specific risks and losses.
- Builder's Risk = intended to cover property damage losses occurring prior to substantial completion; generally do not insure against design error, faulty workmanship/materials, losses resulting from theft.

Surety Bonds

- Not insurance but important risk management tool.
- Bid Bond: intended to assure that contractor will honor bid and sign all contract documents if awarded the contract.
- Performance Bond: intended to assure performance of contractor/subcontractor per contract terms (including price and time).
- Payment Bond: intended to assure proper and timely payment of subcontractors and suppliers to prevent work delays.
- D.C. Green Building Act of 2006: requires a performance bond that is forfeited if the building fails to meet LEED certification requirements of the Act - no such bond currently exists.

III. Owner's Perspective – Contract Drafting

- Broad description of the Work, including accurate and comprehensive description of LEED Certification requirements including work that is reasonably inferable by the Contractor to produce the results “intended” or “indicated” by the Contract Documents.
- State which green building rating system applies, together with year, category and version.
- Require the Contractor and subs to achieve the specified rating within the contract price and completion date.
- Specifications should contain provisions resolving discrepancies, particularly as to LEED Certification items; inclusion of hierarchy for resolving internal inconsistencies within documents and inconsistencies between the documents.
- Which party assumes risk of inaccuracies or omissions in LEED Certification requirements and Contract Documents? Generally, the Owner, but Contractor should have responsibility to report discovered errors, inconsistencies or omissions; Contractor cannot perform any Work (including LEED-related certification Work) in conformity with any Contract Document knowing it to be inconsistent with other Contract Documents or not in compliance with LEED requirements without requesting instructions from Owner and/or Architect.
- Be aware of risks resulting from changes in laws and standards — whose responsibility to anticipate?
- Identify who must determine and undertake the special incentives, permitting, fee refunds, grants or tax rebates and who must prepare and timely submit the documentation. The parties should agree upon a matrix that outlines the respective responsibilities of the parties.
- Get representations in writing as to Contractor's LEED experience, review of documents and conformity to LEED requirements.

Owner's Perspective – Contract Drafting

- Avoid allocation of inappropriate duties to the Owner.
- Prescribe damages – liquidated and otherwise – modify waiver of consequential damages provision to carve-out all damages incurred by Owner resulting from Contractor's breach of contract adversely affect LEED Certification. Define lost rents, fines, unachieved gains in worker productivity, unachieved energy savings, unintended operational expenses, penalties, loss of the benefits as actual damages.
- Allocate responsibility to Contractor for the design to meet the LEED standard if design-build project.
- Anticipate unexpected issues with new products and processes.
- Role of Commissioning Agent and/or LEED Consultant --- Commissioning Agent required for LEED certification – both the Commissioning Agent and LEED Consultant will act as Owner's Representative to ensure that Architect and Contractor satisfy their respective LEED responsibilities.

Owner's Perspective – Contract Drafting

- Who will post bonds or other assurances required by permits or governmental ordinances?
- Integrate LEED specifications, including performance specifications designed to achieve target points, into the contract.
- Pay attention to substitution clauses, particularly if new products or processes involved – limit substitutions without demonstration/guaranty of **No Adverse** LEED impact.
- Require Contractor to bind suppliers and subcontractors to key terms of the contract, involving LEED-related requirements.
- Get warranties of new materials, processes and one year warranty should consider effect of LEED-related defects. Owners should refer to requirements relating to LEED Certification in the warranty provision and provide that Contractor is responsible for making corrections in the Work necessary to achieve and/or maintain LEED Certification that relates to Contractor's warranty work.
- Analyze how the force majeure clause will affect Owner's goals, timing, tax credits, incentives.
- LEED Certification as a condition precedent to final payment is not practicable or generally acceptable to Contractors; however, Owner should submit preliminary review documentation to the USGBC for first review and submit supplementary documentation in support of application for LEED Certification; Owner will want to retain some money until LEED Certification is obtained.

Owner's Perspective – Contract Drafting

- Make a conscious decision about design-build versus the alternatives (Architect, Contractor, construction manager, constructor).
- Is your client's property insurance coverage sufficient? Need for special endorsements to property and builder's risk policies.
- Are green risks covered under the bond or insurance the Architect and Contractor provide?
- Are credits available for your environmental insurance?
- Will training, long term operational policy changes or oversights be needed with respect to operation and maintenance of the property – role of tenants?
- Make sure design of building and construction contract comply with requirements of equity partners, lenders and leases, including right of Tenant to inspect and approve design and construction (particularly important with respect to government buildings and satisfying GSA requirements).

Owner's Perspective – Contract Drafting

- Consider the effect of AIA contract standard clauses – AIA A201 General Conditions – Check clauses on substitution of materials, insurance, extensions of time, compliance with laws, schedules, storage of materials on site, cleanup, indemnity, excusable delays, damages, changes, progress payments, final payment, insurance and correction of work and make modifications to address satisfaction of LEED requirements.
- There is currently no Contractor counterpart to AIA B214-2007, but the AIA is currently in the process of issuing 5 documents to incorporate additional green building provisions in Architect's Agreements and Construction Contracts, Subcontracts and Consultant's Agreements. Documents affect the A101, B101, A201, C401 and A401. A more detailed description of these documents is listed in the Appendix.
- Agreement with the Contractor, Construction Manager or Constructor: e.g. AIA A121 2003 and AGC 565.
- Consider using ConsensusDOCS 310 Green Building Addendum.
- Appendix attaching specific clauses addressing Owner's Green Building concerns.

IV. Contractor's Perspective – Contract Drafting

- Limit representations of qualifications and promises of results or vague representations.
- Document Owner's understanding of the risks inherent in the LEED certification process and Contractor's inability to guaranty USGBC acceptance.
- If Contractor lacks LEED experience, consider retaining services of Architect or LEED Consultant to assist Contractor in satisfying LEED standards from Contractor's perspective.
- Allocate responsibility for the design to Architect and consultants to meet the LEED standards and applicable laws.
- Define job responsibilities regarding LEED certification through Responsibility Matrix.
- Build-in contingencies to achieve LEED certification – seek additional LEED points – 5%-10% is reasonable.

Contractor's Perspective – Contract Drafting

- Many of the same contractual considerations of Owner apply with respect to clarity of LEED considerations and requirements.
- Leave time and sufficient compensation for significant delays, "learning costs" of new products, and difficulties with installations.
- Develop a clear way to deal with changes in work and a clear procedure for product substitutions.
- Bind subcontractors to LEED Requirements.
- Obtain warranties from subcontractors and suppliers to back-up Contractor's warranties-specific reference to performance standards to satisfy LEED Requirements.
- Obtain LEED-related insurance and bonds to the extent applicable.
- Factor in any extra permit, certification, bonding or other costs, but also any additional timing or other costs.
- Use caution with respect to compliance with laws provisions – LEED requirements may or may not be legal requirements.
- Avoid deletion of waiver of consequential damages or modification that excludes LEED certification damages.

Contractor's Perspective – Contract Drafting

- Consider training subcontractors in LEED to avoid significant slush in bids.
- What is the timetable for completion? Have the parties considered LEED compliance delays?
- Are you covered for delays, time and cost of new products and installations?
- Are you covered for products liability risks on new products and processes or innovative uses for existing products?
- Minimize retainage held by Owner until final LEED certification – consider letter of credit.

Contractor's Perspective – Contract Drafting

- There is no AIA Form A214 — don't get lazy (Consider using ConsensusDOCS 310 Green Building Addendum or special provisions like those in Appendix prior to AIA issuance of new forms).

Incorporates contractual best practices to identify the project participants' roles and responsibilities, as well as the implementation and coordination efforts critical to achieving a successful project using green building elements, particularly those seeking third-party green building rating certification.

Drafted to work well with other ConsensusDOCS contract documents and other form contracts.

- AIA A201 — General Conditions — Check clauses on substitution of materials, insurance, extensions of time (includes specific references to LEED-related delays caused by Architect or others), compliance with laws, schedules, storage of materials on site, cleanup, indemnity, excusable delays, damages – liquidated and waiver of consequential, changes, progress payments, final payment, insurance and correction of work.
- Make sure that your client's standard contract covers all aspects of LEED compliance if applicable. Many Contractors have simple forms that may not even include “compliance with laws” provisions and “changes in laws” entitling Contractors to additional compensation pursuant to the Change Order process.

Contractor's Perspective – Contract Drafting

- Identify LEED credits in the Project that may add minimal value but dramatically increase risks – is the building's complexity increased because of Green design and construction? Complexity = greater chance of failure.
- Limit use of Green products that have a very limited in-field service history.
- Avoid implementing innovative and largely new technical practices of little or no expertise with respect to such practices that result in increased chances of construction deficiencies.
- Better management of assuming liability for the emerging long-term building performance requirements that many green rating systems are beginning to implement.

Contractor's Perspective – Contract Drafting

- How will Contractor's LEED services be coordinated with the services of the Owner, Architect and other consultants and separate contractors?
- What has your Contractor client promised?
- Caveat: A word on indemnities – avoid indemnities against loss of leases or tax incentives or general breaches.
- How are damages quantified or limited? It is probably better to agree upon a liquidated damages provision for failure to achieve LEED certification in a timely manner due to Contractor's default.
- Appendix attaching specific clauses addressing Contractor's concerns.