

What's the next big challenge in green building law? LEEDigation

By Christopher W. Cheatham, LEED AP

For the past two years, I have been writing at Green Building Law Update about what I believe is the only truly unique challenge in green building law: apportioning risk for LEED certification.

Green building law is not unique

Most of the liability scenarios that are likely to occur in green building projects are already well-addressed by existing case law. For example, if you have a leaky roof - whether a green roof or not - either a designer, contractor or manufacturer will be responsible. The designer may be responsible for negligent design. Or the contractor may be liable for not building according to the plans and specifications. Obviously, this is an over-simplification, but most courts will simply apply existing construction law to defective green building components, designs and construction.

LEED certification liability is unique

LEED certification presents a new legal issue that has not previously been addressed in contracts. LEED certification is unique in that it involves the performance of multiple parties, each with specific responsibilities necessary for a project's success. Architects are often responsible for designing enough green building components into a building to ensure a certain level of certification. Architects often rely on a myriad of engineers to design energy and structural components.

The contractor, along with numerous subcontractors, must then construct the building as designed. At the same time, a contractor is often responsible for designing and carrying out specific programs that are necessary for certification, such as construction waste management and material sourcing. But LEED certification is not guaranteed even if a contractor and designer perform perfectly. The party responsible for LEED documentation, often a LEED consultant, must then amass records proving compliance with each LEED point. If any one of these parties falls down, LEED certification can be at risk. And this scenario assumes an owner does not make any changes to the design that affect LEED certification.

Do you really know what your contract says? Do you care?

Sometime in 2008, the popularity of LEED hit a tipping point as more businesses decided to pursue certification. The reason these businesses decided to pursue LEED certification is the same reason why LEEDigation - LEED certification disputes and litigation - will soon become reality. Businesses focus on the bottom line and are primarily motivated by profit. Thus, businesses were motivated by profit to pursue LEED certification. There are three essential profit motives for a business pursuing LEED certification: (1) lower operating costs; (2) increased building value; and (3) customer relations.

As more owners now pursue LEED certification for profit motives, the risk of LEEDigation increases. If a project fails to achieve LEED certification, owners can now point to actual damages in the form of increased operating costs or decreased

building values. Previously, when owners primarily pursued LEED certification for environmental reasons or customer relations, it was more difficult to prove damages.

The increased likelihood of LEEDigation leads to one key question: do you really know what your contract says about LEED certification? I have talked to developers who have to achieve LEED Platinum that do not know what their contract says about certification. I have also talked to a cunning lawyer that drafted a contract to include a \$50,000 liquidated damages provision for the failure to achieve each LEED point.

You should care what your contract says about LEED certification. If alarm bells are ringing in your head, I would suggest you undertake the following steps as soon as you get back to your office:

- Pull out all of your ongoing contracts and determine what they say about LEED certification.
- Contact a green building attorney (does he or she know what LEED stands for?) to analyze the risks created by any problematic clauses.
- Contact your insurance carrier or bond underwriter, if appropriate, to determine the effect your LEED contracts may have on your coverage.
- Determine the level of risk you are willing to accept in the LEED certification process and work with your attorney to draft a clause that can be included in future contracts.

Christopher W. Cheatham is an attorney and LEED AP. He is the principal of The Law Office of Christopher W. Cheatham LLP, a full service construction law firm. Chris assists owners, green building contractors and renewable energy companies with contracts, disputes and green building certification. Chris also publishes a widely-acclaimed legal blog, Green Building Law Update (www.greenbuildinglawupdate.com). For his most recent project, Chris is teaming with LEED Faculty member Bob Kobet to educate clients about the risks, costs and value of LEED certification and each LEED point. If you are interested in his services, please contact Chris at 202-553-3181 or chris@cheatham-law.com