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**Green Real Estate Summit 2011: What Attorneys, Developers, Regulators,
Tenants & Lenders Need to Know**
“How Attorneys Can Make a Difference When It Comes to the Greening of Buildings”
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When speaking of the role of the real estate attorney in transitioning the built environment to greater sustainability, one must understand why it is important for that counsel to fully understand what a green building is and what is now referred to as *Sustainable Building Law*. Because there are a myriad of unique issues relating to green buildings, sustainable building lawyers must be able to assist their clients to: allocate "green" risks and rewards when drafting real estate agreements, avoid litigation, mitigate climate change risk, and navigate the constantly evolving regulatory landscape. And although there is plenty of work today for attorneys in this space, only those with green building expertise will be prepared to meet this challenge and stay a step ahead of the curve for future opportunities.

The Moving Finish Line. When green building certification and rating systems began, and up until a little while ago, the goal of the parties in the sustainable building world was the awarding of certification for a property or a premises.¹ Because this field is relatively new, there are only a few lawsuits that have been filed specifically addressing sustainable building legal issues. In fact, the first widely discussed and reported case relating to *Sustainable Building Law* (Southern Builders v. Shaw Development²) dealt primarily with the failure of a property to obtain the requisite certification by a date certain.³

In the "original finish line" days, the players were the traditional ground-up or retrofit contractual parties, namely the property owner⁴, contractor, architect/engineer. But once the property or premises obtained its certification, the job was done and everyone celebrated and went on their merry way. However the world has changed, and now the finish line is moving and, in fact, there may not even be a finish line to speak of anymore.

With the morphing of green building rating systems, the looming deadlines for recertification, and new data collection and reporting requirements, organizations like the USGBC⁵ now have the right to decertify or, in the future, possibly reduce certification levels if a

¹ Certification by organizations such as U.S.G.B.C. (LEED) and GBI (GREEN GLOBES) (among others)

² 19-C-07-011405 in the Circuit Court for Sommerset County, Maryland, February 2007

³ Southern Builders involved a developer (Shaw Development) who contracted with a builder (Southern Builders) to construct a LEED Silver property to be certified by a date certain. The deadline was never met and the ensuing lawsuit, first filed by Southern Builders against Shaw for failure to pay a portion of the contract price to construct a \$7.5 million, 23-unit condominium, and then a counter-claim filed by Shaw against Southern Builders for failure to meet the contract deadline and the ensuing damages including without limitation the loss of \$635,000 in tax credits). Shaw eventually declared bankruptcy.

⁴ This could include a tenant if it sought certification for commercial interiors – see U.S.G.B.C. – G.B.C.I. Commercial Interior certification

⁵ U.S. Green Building Council

property no longer maintains the requisite points originally obtained for certification.⁶ This presents a whole new set of legal issues for an owner of a green certified property. Most of us understand the certification piece of the puzzle⁷ and how a property owner in its desire to be sustainable and marketable, chooses building certification as a goal. Recertification, however, brings us to the next step because it will involve the same parties originally in the picture⁸, but will also include energy monitoring and reduction-facilitation companies, janitorial service companies supplying products and services to the certified building, pest-control companies servicing the building, water meter and reduction-facilitation companies, HVAC service companies, Escos, energy or water meter reading companies, attorneys, and others. Since the point-structure of a rating system depends on all of these parties doing their jobs adequately, if any one or more of them drop the ball, the entire certification could be at risk. The sustainable building world is now much more complicated.

Similarly, if a property's certification is at risk, those municipalities that require LEED certification (or another rating agency's certification)⁹, for issuance of certificates of occupancy or other renovation permits or building licenses, could impose their own penalties on the property owner if they fail to comply with local law because their property loses certification or has the certification level required by the municipality downgraded. Yet property owners continue to have the pressure to meet market demand and the market is pushing certification in a very big way.¹⁰ In fact, as in New York City¹¹ where recently enacted local laws require energy benchmarking, metering and monitoring of energy and potable water consumption, there will probably be many property owners who decide that since they have to pay a substantial amount of money to comply with these new laws, that for a little extra, they can obtain the coveted "certification" of their property.

So where does this leave our clients in the *Green Building World* if they need a well-versed *Sustainable Building Law* attorney? The answer is probably that they will find them in the new breed of "green lawyer" specialists out there, and who can implement the greening process for their clients in a way that other "non-green lawyers" cannot.

Why? When a property owner decides to build sustainable ground-up construction, have a major retrofit to an existing building, or if a tenant wishes to obtain certification for its commercial interiors, or if there are other clients wishing to go green in one way or another, there are certain issues those of us in the green space can spot without much effort. For example, if our client is having a property or premises built, the contract with the contractor and the contract with the design professionals (architect, engineer, others) should be explicit in spelling out which party(ies) bear(s) the risk for failing to achieve the desired goals of the property owner. Where as in the past we attorneys were mainly concerned about our client's (especially when they were the property owners) getting what they paid for (namely a structure built to the

⁶ USGBC right to decertify properties if they fail to meet USGBC's Minimum Program Requirements (the project must comply with environmental laws, be complete and permanent, must utilize a reasonable site boundary, must comply with minimum floor area requirements, must comply with minimum occupancy rates, must share whole-building energy and water usage data, and must comply with minimum building area to site area ratio)

⁷ Obtaining initial certification (either for the entire building or a commercial interior premises)

⁸ Property owner, contractor, design professionals

⁹ San Francisco requires new commercial construction over 25,000 square feet must achieve LEED Gold in 2012

¹⁰ See Pike Research - <http://www.pikeresearch.com/research/energy-efficiency-retrofits-for-commercial-and-public-buildings>

¹¹ Local laws 84, 85, 87 and 88

specifications they desired and articulated in the plans and specifications by the architect and engineer), now we need to also focus on the tangential and continuing covenants and legal requirements that abound¹². These could include those which address obtaining building certification or recertification, meeting metering and monitoring requirements (which could be rating system driven or local municipality driven), meeting reporting requirements and others. Additionally, if a client discusses with their counsel their goal of obtaining certification, we would be remiss in our duties if we did not now address what may happen later after the property is certified. Ongoing property operations and maintenance is therefore a crucial element to the property maintaining its certification and the client seeking to keep the certification would need additional protection to get there.

So the transition to green does not have to be onerous, just facilitated by those who understand the green picture. We will be the ones counted upon for interpreting the new laws (federal, state and local), regulations, rating system changes¹³, tax credits, and other issues affecting green buildings and how all of these relate to our clients. It is not only interpreting the existing and upcoming laws for our clients, but we will also need to try to predict how a failure to comply with these laws may result in fines, penalties, the affect it may have on certificates of occupancy or even the issuance of permits by local building departments.

If our clients are involved in the "greening process" (either as a property owner, property manager, tenant, or as a provider of services or products to a green building), we as their counsel will need to apportion risk in the many contracts to be executed to get the building green or greener. This is especially true because some of our clients are holding themselves out as "green specialists" and there is a growing concern that the rising standard of care will subject those professionals to liability never envisioned before.¹⁴ Will they be held to a higher standard of care? Probably yes. And even when professional liability insurance products are introduced in the market to protect these sustainability experts, it is going to be up to us to continuously protect them in our drafting of contracts.

To fully understand why this issue is important, let's look at the original risks encountered in the green building world. The days of the old liabilities of failing to substantially complete construction at all, or failing to deliver a specified certification level of a property by a date certain, may be a thing of the past. In those days, the potential damages were usually limited to the property. But the time of the *new liabilities* could be here before we know it. Our clients could be facing third party beneficiary liability and consequential damages that are far broader than we ever imagined. Think of the tenant who signs a lease where the landlord has a covenant to deliver and maintain a LEED Gold building and what would happen if the rating of the building is either not there at all when the premises are delivered to the tenant, at a lower level than promised, or is lost or downgraded during the term of the lease? If the tenant has a termination right or a reduced rent provision in its lease, the landlord is going to look to others to share in its losses.

¹² Such as meeting local laws

¹³ U.S.G.B.C. LEED 2009, V3.0, for example

¹⁴ As with any specialist holding themselves out as one, courts will generally hold them to a higher standard of care than non-specialists. See *FDIC v O'Melveny and Myers*, Ninth Circuit Court of Appeals, 969 F.2d 744 (9th Cir. 1992) and *Gulf Coast Investment Corporation v. Brown*, the Court of Appeals of Texas, 821 S.W.2d 159 (1991)

Similarly, when there are local municipal consequences due to a decertification or downgrading of certification, what penalties may ensue? Certificates of occupancy could be revoked, building permits could be denied, and licenses could be at stake. How will this then affect the property owner? One thing is for sure, we are entering a brave new world that demands a higher level of expertise to dissect these issues and we as attorneys in the sustainable building world will be looked to as possessing it.

Like the LEED Rating system with its synergistic approach, all service providers and some product suppliers/manufacturers could not only have a part in making a property green, but also share in the risks if the property loses its green hue. In reality, because the finish line has no date certain, we who practice in this space will be relied upon to assist in the greening of all buildings for many years to come.

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