

**American Bar Association
Forum on the Construction Industry**

Further Considerations In Connection with “Green” Building

**Steven M. Charney
Peckar & Abramson, P.C.
41 Madison Avenue, 20th Floor
New York, NY 10010**

Presented at the 2012 Fall Meeting

**ABA Forum on the Construction Industry –
2012 Fall Meeting Construction Counseling:
Pulling Together for a Winning Strategy**

October 18 – 19, 2012

Sheraton Boston Hotel, Boston, MA

©2012 American Bar Association

The informative piece written by Ed Gentilcore, entitled “THROUGH THE GREEN LOOKING GLASS: *PURSUING SUCCESSFUL GREEN/SUSTAINABLE CONSTRUCTION WITHOUT FALLING INTO THE RABBIT HOLE*” covered a vast array of issues inherent in “Green Building”. This piece will briefly address certain other issues and considerations of interest to construction lawyers that were not included within the scope of the extensive analysis provided in that article.

Review of the many articles, blogs, commentary and guidance documents addressing green construction reveal one common theme – it is not clear what exactly is meant by “green”. If the very premise, or starting point – defining what is meant by “green” – is unclear, one can readily imagine that pretty much all that follows will not be particularly clear either.

Nevertheless, the evolution of “green” continues, by legislation, codes, adoption by public and private organizations, and the growth of private organizations that “certify” green. Whether we are experiencing the vagueness inherent in a new initiative as it takes hold, or a divergent in perspectives that will render the “green” landscape challenging to maneuver, remains to be seen, but there are some positive signs that it is the former.

An Overview of ConsensusDOCS 310 – Green Building Addendum

ConsensusDOCS was the first to produce an industry standard form agreement to address green construction, having issued the ConsensusDOCS 310 Green Building Addendum in November of 2009.¹ ConsensusDOCS 310 is designed as a single addendum that can be used in connection with owner-architect agreements and owner-contractor agreements, with the intent being that the addendum would be used for uniformity and consistency.

Explicitly, implicitly or unknowingly, much of the discussion or debate with respect to green construction has centered on the fact that there is no one definition of “green”.

ConsensusDOCS 310 begins with the premise that there is no one definition or application of “green” to construction projects. As opposed to proceeding as if there was such a standard definition, the ConsensusDOCS 310 sets out the process to be followed by the project team to first establish what the Owner of that project may regard as its “green” goals or objectives. Once that is determined, the participants in the project are provided with a process by which the participants identify the specific tasks that are to be performed, and by whom, for those “green” objectives to be accomplished.

There is no presumption that LEED will be utilized. In fact, there is no presumption that there will be any certification or rating at all. The project may very well utilize a LEED rating, and the ConsensusDOCS 310 is designed to facilitate employment of LEED if the parties elect to do so. There are, however, no particular goals provided whatsoever. Instead the ConsensusDOCS 310 sets forth a process by which the participants in the project can support the owner in identifying the “green” objective that may deem right for that particular project. The ConsensusDOCS 310 then provides the process by which the parties’ individual tasks and activities are to proceed in the effort to achieve those objectives.

The ConsensusDOCS 310 also does not proceed with the assumption that the owner, architect or contractor should be the leader of the “green” effort. There is, however, a clear recognition that there needs to be a leader. To that end, ConsensusDOCS 310 creates the role of a Green Building Facilitator (“GBF”), who may be the architect, contractor or a separate consultant.

The ConsensusDOCS 310 recognizes that achieving “green” objectives can rarely be accomplished by only one participant in the project acting alone. For example, achieving a particular “green” rating or certification often involves the installation of components called for in the design (bicycle racks are commonly cited), or sourcing or disposing of construction waste in a particular manner.

Someone needs to identify the entire package that is necessary to achieve the Owner’s objective. Someone must make sure that the designer, for example, is told to include the bicycle rack in the design, so the contractor knows to install it. Someone must make sure that restrictions regarding sourcing and disposal are properly identified up front and imposed upon the contractor. Additionally, if an issue arises during the course of the project that could impact achievement of the “green” goals that the Owner has previously selected, someone needs to take leadership in addressing that situation and pursuing a solution. The GBF is that someone.

The role of the GBF is, nonetheless, designed to respect the conventional boundaries and roles of the other participants on the project. For example, the architect remains responsible for the design of the project, as the law in most, if not all, states requires that to be the case, and the contractor remains responsible to construct in accordance with plans and specifications.

Aside from creating the role of the GBF, the thrust of ConsensusDOCS 310 is intended to provide a process that is designed to facilitate identifying and achieving the Owner’s “green” goals. That process is provided for each of the key phases of the project, beginning with identification of the “green” goals that may be most appropriate for that Project, then the design phase and ultimately the construction phase. ConsensusDOCS 310 also operates from the premise that it is the Owner that should ultimately make the decision as to which goals it may deem most appropriate, and should make those decisions with the benefit of the input from the

designer, contractor and GBF regarding the cost, performance and schedule ramifications of the various options. The Owner then sets and establishes in writing the “green” goals that it seeks to achieve for that project. The issue of defining what “green” means is thereby determined by the Owner for that project.

Once the green goals for that project are set, the next phase is to identify the package of activities that will achieve those goals. ConsensusDOCS 310 recognizes that some of those activities may be design elements that will be included in the plans and specifications, while others may be procedural – requiring a process by which the work will be performed (for example, sourcing or disposal of materials). The activities are generally classified in these two categories, to enable a process by which the team, led by the GBF, can ensure that all know what will be required. Ultimately, the design features are included in the plans and specifications, while the procedural requirements are set forth in one clear and easily identified place to help ensure that they are well understood and recognized. ConsensusDOCS 310 also affords both the designer and the contractor with a process to follow should it find itself uncomfortable with an approach proposed by the GBF.

ConsensusDOCS 310 also addresses the issue of consequential damages. The approach used is based on the fact that ConsensusDOCS 310 is an addendum to other agreements. After establishing that damages stemming from the failure to achieve “green” goals will be considered consequential, the approach to addressing consequential damages identified in the agreement, to which ConsensusDOCS 310 is an addendum, dictates whether the damages are waived or recovered, unless stated otherwise.

The Greatest Risk Inherent in Building “Green”

There has been considerable discussion about the risks of green construction, often focusing on the consequences of failing to achieve a desired rating or status. The article by Mr. Gentilcore referenced above addresses the limited litigation that has occurred in regard to “green” construction to date. In short, there has been quite little, leaving the door open to informed speculation.

In this author’s view, the greatest risk or exposure that “green” construction will likely trigger is in the area of defect claims and disputes. In general, over the past twenty years there has been a dramatic increase in building defect claims and disputes. Experience has revealed that a common theme in defect cases has been the use of a material or building system that is new or newer. The use of newer products and systems, in turn, dictates one or more of the following concerns:

- 1) the product or system has had little or no time tested performance,
- 2) those performing the installation are not experienced in so doing, and
- 3) those maintaining and operating the resulting facility are not prepared to do so properly.

Consequently, the potential for defect disputes elevate.

Green construction often dictates that newer systems and products will need to be employed in connection with the project. Simply put, that has been the recipe for defect claims and disputes in the past and can be expected to trigger more such problems in the future. One reason that we may not have heard much about “green” disputes is that the dispute may not appear to be such. The dispute may be seen as a more typical defect claim, while the underlying cause may have emanated from the desire to use “green” systems or products.

The Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Company, et. al., 2012 U.S. Dist. LEXIS 39886 (D. Md. Mar. 23, 2012) provided a window into the merits of this observation. In that case, it was alleged that Parallam beams were used, at least in part, to achieve LEED status. The beams allegedly failed leading to water infiltration. “Going green” is not in and of itself seen as the cause of the alleged problem, but apparently it did lead to the use of a material in that application that allegedly failed.

It is of interest to note the objection that certain industries have posed to green initiatives in legislation or adoption of green initiatives by public entities. The American Chemistry Counsel, in asserting that the federal government’s reliance on LEED is misplaced, argued that the drive to comply with LEED protocols “will mean that project teams will not be able to choose certain materials.”²

We may never have a clear picture of the frequency of problems leading to disputes that have a genesis in the goal to build “green”, but recent history and common sense suggests that the use of something new or different creates a backdrop for more frequent mistakes.

Insurance Implications

While some insurers have issued products targeted to provide “green” insurance coverage, there has been little written or published on this topic. In large part, the construction industry has relied on existing insurance products to provide necessary coverage. David Marino, Executive Vice President of the Construction Services Group at Aon Risk Solutions, reports that, in general, the reaction of the insurance markets in generating “green” insurance products and endorsements has greatly lagged the evolution of “green” in the construction industry.

The most often cited exposure to elevated risk for contractors and designers in regard to building green is the failure to achieve a proposed goal or standard. In that regard, designers generally already maintain professional liability coverage to provide protection from similar exposures in other contexts, as do some construction managers. The question arises as to whether services provided by designers or construction managers regarding “green” certification (such as LEED), are “professional services” for which coverage is afforded. While existing coverage under professional liability policies may apply in the green context without modified language, is it best to include specific language in the policy to address this point? Stated differently, a failure to meet a “green” objective could generally be covered under a professional liability insurance policy in the same manner as would any other failure of the design professional or construction manager to meet its other professional responsibilities, but a carrier could attempt to argue that such services are not within the definition of “professional services” under the applicable policy.

Mr. Marino advises that certain insurers are willing to add language to professional liability policies to address doubt in regard to the scope of “professional services” covered by applicable professional liability policies. For example, both Lexington and Zurich have included language in their professional liability policies stating specifically that services regarding LEED certification are included within professional services insured under relevant policies. Such language should resolve any question as to whether professional services of a design professional in regard to LEED certification is properly considered a professional service for which coverage is afforded.

If a contractor fails to build a green component of a project as required by plans and specifications, that failure would typically be regarded as a breach, triggering warranty

obligations to correct defective work or the need to draw upon a subcontractor to do so. Default insurance or surety products, such as performance bonds, would generally respond in such situations. The fact that the default or breach was attributable to a failure to properly install a “green” component would typically not be expected to alter the fact that it was a default or breach. Accordingly, the fact that the problem emanated from a “green” initiative has not led to alternative default insurance protection or surety products to address this risk.

Property damage exposures under General Liability policies face similar trappings as in other contexts. Restrictions that may be applicable to coverage for the correction of faulty work will likely be present in the context of addressing faulty “green” work as well. Again, the fact that the faulty work involved “green” work would not be expected to affect the manner in which faulty work would otherwise be treated under relevant policies.

In the event that a property policy would cover the repair or replacement of “green” work or systems, a question could arise regarding the costs that the insurer will bear. For example, will the policy cover replacement with a system that meets the original “green” performance criteria, and will the policy cover the costs that may be attendant to recertification?

Mr. Marino reports that increasingly insurers are willing to add “green” endorsements that expressly state that coverage would include the cost of comparable “green” systems and costs attendant to re-certification. In fact, Mr. Marino points to the emergence of property policies that, for additional premiums, provide for the replacement of traditional systems with upgraded “green” systems.

Beyond LEED and Understanding What LEED Does and Does Not Seek to Address

LEED has been remarkably influential in shaping the move towards “green”. Having created a platform that brings at least some level of objectivity and order to building “green”, LEED provides a construct within which some form of measurable or quantifiable objectives have been established.

The United States Green Building Council (USGBC), through LEED, does not require that any particular set of activities be employed on a project. LEED instead provides options, each of which yields a number of points, which, when totaled, may result in the LEED rating. The primary criticism of LEED stems from that structure – that it does not, for example, require any particular energy savings or performance, nor does it verify that any particular performance goal has been achieved. Additionally, USGBC/LEED does not verify that particular materials in fact result in sustainable benefits.

In fact, USGBC does not pretend to do otherwise. The typical response from LEED when faced with the criticism that it dictates the use of approaches that may not perform appropriately or actually achieve desired results, is that LEED does not assess those issues. LEED instead leaves it to those developing the program for a particular project to determine performance and the actual benefits that will be derived.

From these views and limitations have stemmed alternatives to LEED. *ASHRAE* (American Society of Heating, Refrigerating and Air-Conditioning Engineers), ANSI (American National Standards Institute), IES (Illuminating Engineering Society), together with the USGBC, developed Standard 189.1. Standard 189.1 is essentially a “green” protocol designed to dictate standards and requirements for buildings. Standard 189.1 is performance based, with the resulting goal that “green” buildings will, in fact, perform better in a variety of

aspects related to sustainability. Standard 189.1 therefore operates like a code, with specific requirements, in contrast with LEED, which does not dictate requirements.

The article by Mr. Gentilcore referenced above addresses the International Green Construction Code (IGCC), issued by the International Code Committee. Prior to the issuance of the IGCC, speculation raised the concern that the IGCC would conflict with Standard 189.1, leaving the industry to struggle with differing code requirements. Fortunately, those developing the IGCC reached an accord with their counterparts involved in Standard 189.1. The resulting IGCC provides for the option of complying with either the IGCC or Standard 189.1, potentially avoiding the scenario in which differing codes could be employed in different jurisdictions.

Another alternative to LEED/USGBC is the Green Globes model. Although offering differences, Green Globes is similar to LEED in that it is a rating system as opposed to a code that dictates particular requirements. Reports from a “listening session” hosted by the United States General Services Administration (GSA), Department of Defense and Department of Energy, to assess rating systems, indicate an overwhelming preference for LEED. The reports speak of a preference for Golden Globes in connection with new construction, while LEED was preferred for renovations. Overall, LEED was deemed the preferred rating methodology overall.

¹ In the interest of candor, this author was one of the co-chairs (together with Edward Gentilcore) of the task force that developed the ConsensusDOCS 310 and served as the lead draftsman of the document.

² See Cal Dooley’s (President of the American Chemistry Council) letter to Representative Alexander dated May 31, 2012.
https://www2.buildinggreen.com/sites/buildinggreen.com/files/Blog_Images/PDFs/LeedFollowup.pdf