American Bar Association
Forum on the Construction Industry

THROUGH THE GREEN LOOKING GLASS:

PURSUING SUCCESSFUL GREEN/SUSTAINABLE CONSTRUCTION WITHOUT FALLING INTO THE RABBIT HOLE

Edward B. Gentilcore, Esquire
Sherrard, German & Kelly, P.C.
28th Floor, Two PNC Plaza
620 Liberty Avenue
Pittsburgh, PA 15222

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

THROUGH THE GREEN LOOKING GLASS:

PURSUING SUCCESSFUL GREEN/SUSTAINABLE CONSTRUCTION WITHOUT FALLING INTO THE RABBIT HOLE

I. APPROACHING THE LOOKING GLASS

We are now at a time removed almost twenty (20) years from the founding of an organization dedicated to the concept that building design and construction needed to change. The entity had its focus on goals associated with the development, design and construction processes in such a way that the outcome would be lessened impacts to natural resources, reduced consumption of energy, electricity and water and, in turn, an overall improvement in the habitable spaces resulting from these building efforts.

Indeed, it was the earliest efforts of the U.S. Green Building Council ("USGBC"), among others, that helped to launch on a large scale the desire to pursue sustainable and high performance buildings. The USGBC began its efforts with the development of the Leadership in Energy and Environmental Design ("LEED") Program. It is through LEED®, now available in multiple iterations and applications for a variety of design and construction undertakings, that helped to put green design and construction firmly on the computer terminals and drafting desks of designers and developers around the country (as well as around the globe).

While its growth was in part stimulated and supported by government-related initiatives such as tax credits and other non-mandatory means of encouraging the pursuit of LEED, this program remained largely voluntary. Still, there was no denying the impact that the "growth" of LEED and of green building generally on the construction market place. Often times, owners and developers are desirous of pursuing a green and sustainable path for their buildings notwithstanding uncertain return on investment and unfamiliarity with the territory into which they are about to embark for their next design and construction journey. To say that there have

been unique challenges on the road to green construction is perhaps an understatement. While the initial hue and cry of imminent industry debilitating litigation and conflict have not yet paralyzed the wide-spread adoption of green and sustainable building techniques, there are still very much signs of concern on the horizon. By the pursuit of this process, many participants have had the opportunity to look through the green looking glass finding it in almost "Carrollian" terms, similar in appearance but very, very different in approach and treatment.[i] It is perhaps also appropos that Lewis Carroll's reference to Alice falling into the rabbit hole is an apt analogy to what can befall the participants on these projects when adequate care is not given to mitigating risks associated with them.

The biggest challenge facing green design and construction, even at a time more one score after the creation of the USGBC and after nearly two (2) decades of development of the LEED Rating System, is that green remains an intractable proposition due to differences in terminology, definition, performance criteria, expectation and even the consequence of non-achievement. While green began as a voluntary program, due to the developments and initiatives adopted by many legislatures across the country, LEED now presents itself in a much far different form no longer the welcoming friendly program that could be embraced or disregarded at the choice of the consumer, but now the *required* element of compliance necessary for the owner/developer to achieve building occupancy consistent with regulatory criteria. Although we now embark on a now more mandatory phase of green and sustainable design and construction, we still remain cognizant of the challenges facing all green and sustainable projects that have not yet been sorted out for even the voluntary participants. Issues such as costs, representations, risk allocations, liability and emerging technologies all continue to co-exist in a place where the right amount of foresight and planning may very well avoid rabbit holes of peril.

II. CHANGING PERCEPTIONS

Perhaps we ask too much presently from what is to be achieved from the development of green and sustainable design and construction. As planned, some of these newest structures are now expected and required to lessen the impact on the environment surrounding the building, reduce disposal of waste, lessen the use of scarce materials, maximize the efficiency of the building's consumption of water and electricity, and provide those using the building with overall enhanced lifestyle in terms of air quality, lighting and comfort. This is a formidable task for even the most aggressive planning yet, because of the perceived societal benefits associated with green sustainable design and construction, parties have been far more willing to undertake this task than could have been expected in an industry somewhat and sometimes labeled as reluctant to change. Even those reluctant hold-outs in the design and construction community may now face the reality that green is already evolving before their very eyes. We now face a time where these green and sustainable features are finding themselves into building codes and other ordinances, including through direct incorporation of LEED by reference, requiring that some level of green and sustainable achievement is necessary, if not mandatory.

However, what has not yet evolved completely is the contractual management of the risks associated with these projects. In addition, many parties are finding themselves obligated to provide representations relative to the performance of these buildings or the achievement of the end product in such a fashion that those parties are positioning themselves for extreme vulnerability when it comes to claims that the end result is not what was promised at the outset. Making all of the above even more complicated is that the unique nature of green and sustainable design and construction is often dependent on the use of technologically innovative materials, equipment and processes, which are not yet proven by either operation or the test of time. By

way of example, making certain that complex energy modeling matches the ultimate result in terms of equipment and building performance may be far more difficult than the parties initially anticipated.

Three (3) main points must be generally emphasized when encountering any green and sustainable project development in order to appreciate and address the potential risks. First, it must be recognized that emerging technologies will be involved on these projects including materials or equipment that are not yet proven in actual use or operation. The second item of note is that green performance and success depend on a close interrelationship and coordination of performance between the owner, design and construction teams. Therefore, placing the onus of responsibility too heavily on one party to the exclusion of the others will be fraught with the impossibility of incentivizing all of the parties to then engage in what is necessary to achieve reduction of risks for all participants. A third key element driving the risk of green and sustainable design and construction emanates from incentives supplied initially to fuel these projects and that these incentives are now being transformed into obligations of performance under building code requirements. However, what exists at the regulatory level is a traditional enforcement mechanism that is not yet equipped or trained to adequately evaluate and assess the green and sustainable elements of performance that these newest building ordinances require.

Still, there is an overall incentive and benefit to pursuing green and sustainable design and construction on the next project and for projects in the years to come that are driving the industry forward to achievement in numbers and on scales that are remarkable. Once upon a time, the highest level of LEED Rating, the Platinum-rated building, was very few and far between in terms of accomplishment. Fast forward to the present, where there are now plans for platinum superstructures that will accompany and join the ranks of now a growing list of projects

that have achieved the highest rating recognition under the LEED Rating System.[ii] Indeed, vastly greater numbers of buildings have achieved LEED recognition at the gold, silver and certified levels.[iii] Nevertheless, it is perhaps that last point, the codification of green, that will present the biggest challenge to green yet. While it was one thing to incentivize the project participants to pursue green through carrots such as tax credits, building permit review acceleration or other similar incentives for the incorporation of green or even LEED elements into their project, it is quite another thing to transform these carrots of incentive into sticks of obligations. Indeed, some of the earlier obligations came from the federal government, including the General Services Administration ("GSA"), based on its position that all projects being leased by the GSA had to be LEED Gold or higher (as of 2011). However, even that obligation is now coming under some scrutiny. Very recently, 56 U.S. House representatives wrote a letter on May 18, 2012 to Dan Tangherlini, requesting him to stop using LEED to guide the GSA's buildings because they assert LEED is pursuing an agenda requiring use of more expensive materials.[iv] In response, USGBC issued a statement that its program was a voluntary, consensus-driven process. This presents, perhaps, a mixed message coming from the USGBC itself. While the intent of the USGBC as recently stated is that "LEED is a voluntary non-governmental rating system", the USGBC also itself reports that "34 of the jurisdictions that have adopted USGBC's voluntary green rating system include LEED as a mandatory requirement" for certain buildings in their community.[v]

The GSA has been evaluating its use and implementation of LEED despite these calls by some for discontinuing LEED's widespread application altogether. For example, on the Federal Center South Project in Seattle, Washington, a .05% holdback was implemented on this $66

Million GSA design-build undertaking to assure actual building performance consistent with, among other things, 30% or greater reduction in energy use than ASHRAE 90.1-2007 standard.[vi] Also, a study conducted by and released in May of 2012 by the GSA showed the GBI's Green Globes rating program aligned more closely with the federal sustainability requirements than any other green building rating system for new construction, even LEED.[vii]

Whatever the USGBC may be saying, LEED is finding itself incorporated into a wide variety of laws and codes across the country. For example, the *New York City Local Law 86 of 2005* (LL 86) requires most of the city's capital building projects to meet LEED requirements. Likewise, New Mexico's *Executive Order 2006–0001*, requires the pursuit of LEED Silver Rating Certification on new public buildings.[viii]

One of the most aggressive efforts of incorporating mandatory elements of green and sustainable design and construction comes from the State of California where it recently adopted the California Green Building Standards Code ("CalGreen"), effective January 1, 2011. CalGreen does incorporate many voluntary elements along with certain mandatory requirements. In a sense, the criteria incorporated in CalGreen and its approach have almost a LEED-type feeling. However, because it so comprehensive in its approach, CalGreen will undoubtedly be looked to as a potential model for those other governmental entities interested in developing green building codes of their own.[ix]

Likewise, the Illinois *Green Building Act/Green Building Guidelines for State Construction* will also likely be a focal point of interest.[x] Illinois' *Green Building Act* embraces both LEED and the Green Building Initiatives' Green Globes rating tool program. As such, while that Act provides some more flexibility, it still ends up incorporating these voluntary measures with the force of law.

Perhaps the most ambitious program and comprehensive codification of green/sustainable design and construction requirements comes from the development of the International Green Construction Code ("IGCC"), which is the creation of the International Code Committee ("ICC"). The IGCC was developed by the ICC in close cooperation and with the assistance of ASTM, ASHRAE (American Society of Heating, Refrigeration and Air-Conditioning Engineers), the American Institute of Architects ("AIA"), the USGBC and the Green Building Initiative. A review of the IGCC evokes its more mandatory nature, although it does adopt and incorporates certain voluntary concepts as well. It is applicable to both new construction as well as the alteration and additions to existing buildings.[xi] Interestingly, even while the IGCC was being vetted in its own internal review and comment process, targeted toward the 2012 launch, it was adopted even before then by Rhode Island in January of 2011 as an alternative requirement for new public buildings, it was embraced in Kayenta Township, Arizona as the first tribal community to enact the IGCC as an optional requirement (with mandatory applications still under consideration), was implemented in Richland, Washington as an optional code and was signed into law in the State of Maryland with an effective date of March 2012 (albeit as an "optional" requirement for new construction involving commercial buildings and residential buildings more than three (3) stories).[xii] Components of the IGCC were also adopted as a part of the new Phoenix Green Construction Code recently passed in Phoenix, Arizona to govern the construction of many of the buildings covered by that regulation.[xiii]

In the words of the ICC itself, "[t]the [IGCC] creates a regulatory framework for new and existing buildings, establishing minimum green requirements for buildings and complementary voluntary rating systems which may extend beyond the customizable baseline of the IGCC. The [IGCC] acts as an overlay to the existing set of International Codes, including provisions of the

International Energy Conservation Code and *ICC-700, the National Green Building Standard*, and incorporates ASHRAE Standard 189.1 as an alternate path to compliance."[xiv]

All of these code adoptions make the concept of green building even more complicated. Indeed, whether or not to pursue green is now no longer a choice in some circumstances. If the choice of whether or not to pursue green construction now appears to be absent from the equation, the parties must be focused and forced to acknowledge the alternative means and options of dealing with green. To be green or not to be green is no longer the question. Instead, the question becomes, "now that I must go green, how is it that I will achieve the required results with the minimum of risks to my company whether I am the developer, the designer, the constructer or the material supplier?" Some of the contract models which will be discussed further below now obligate the owner to identify the laws and codes impacting project construction (including those that might implicate green/sustainable elements). Consequently, the owner's obligation becomes far more significant under these approaches.

Similarly, satisfying the building code inspector may now mean not only meeting the requirements of the local inspector, but also the third party, non-governmental rating agency, such as the Green Building Certification Institute ("GBCI"), the third-party rating agency created by the USGBC to administer and process all LEED rating applications. Likewise, there must be an acute concern regarding the ramifications of a failure to achieve compliance with these ordinances. If a project now is unable to achieve the required level of LEED certification, is the building's occupancy permit now in play? Further, given that the occupancy of the building is delayed by the failure to achieve required LEED recognition, what are the consequences to the parties due to the delay in and failure of delivery? Moreover, what is the result of statutes incorporating static iterations of LEED (*e.g.* LEED NC 2.2), and the continued evolution of

LEED including the most recent versions issued in 2009 and 2012?[xv] Will it be possible or even practical for the USGBC to assess building performance under an older, superseded criteria when the machinery of the USGBC, the GBCI and LEED are now focused on more recent versions being administered?[xvi] As will be discussed in further detail below, the industry has begun to recognize the impact that this codification of green will have on the industry. Even the AIA has acknowledged that incorporation of green and sustainable requirements into building codes and other building regulations will undoubtedly impact the standard of care of design professionals, positioning the entire design community in an evolutionary cycle that is not yet certain in terms of its end destination or outcome.

It is perhaps the best time to take greater control of the *process of* green building even though much control of whether or not to go green is giving way to mandatory requirements. All parties must fully investigate the statutes or other regulations in effect in the applicable jurisdiction that may implicate following or complying with LEED, the IGCC, Green Globes, CalGreen or other similar green building requirements. Thereafter, the project's goals and objectives should be discussed broadly and deeply as part of the initial planning phases of the project, involving, most certainly, the owner and the design team, as well as, if possible, the construction professionals. These goals and objectives for the project should be defined as early as possible as part of the project's program. If achievement of LEED is the required or mandated goal, that needs to be specified and the contractual documentation must be structured accordingly to reflect that objective with almost mirror-like precision, as opposed to the false appearances encountered by Alice after her passage through the looking glass. If energy saving rating rather achievement is than the ultimate project objective, goal, then the parties' discussions should focus on building and system performance and those elements of the Project dialog should be

incorporated into the contractual documentation. Further, as will be seen as a part of the ConsensusDOCS Green Building Addendum approach, it is possible that both LEED Rating Recognition as well as high energy performance are desired. In that instance, the contract documents for both design and construction should be reflective of that dual choice. Thereafter, the parties can proceed on the building with a clear understanding of each other's obligations and responsibilities in the overall green building delivery process.[xvii]

Overall, the lesson to be learned from the foregoing discussion is that detailed research needs to be undertaken in the jurisdiction where the design/construction is about to take place regarding what elements of green/sustainable performance are required by way of incentive-based measures or even more mandatory building code requirements. At that juncture, the parties need to embrace what will be necessary in order to achieve the satisfactory results for the project, so that its ultimate occupancy is not impeded by an inadvertent lack of understanding about the minimum "shade of green" required.[xviii]

III. REPRESENTATIONS AND RISKS TO AVOID WHEN PURSUING A GREEN RESULT

Regardless of whether green/sustainable requirements are finding their way into the statutes and building ordinances to be applied to your next project, another key element to consider is what representations are being made by the contracting parties relative to the project undertaking. Some of the cases emerging to date in this area have focused on representations made regarding project performance that turned out to be less or different from that promised. Actually, one of these cases regarding representation involves the USGBC itself. While the latter case ultimately proved to be unsuccessful, some of the language and concepts launched in that matter may very well be renewed in other suits presented in this area. Although the flood gates of litigation have not opened as was once predicted by many evaluating the emergence of

green building concepts, there is still a notable trend in these cases regarding the grounds asserted for potential liability.

The first of several cases to be considered comes from the State of Illinois and appears to be a more traditional modeling of a construction claim. That case, *Bain v. Vertex Architects*[xix], involved claims by the homeowner-plaintiff that defendant did not "diligently pursue and obtain for the Project certification from the USGBC LEED For Homes Program" when the project's "objective . . . was to 'create a sustainable green modern single family home.'" In fact, as identified in the complaint, the architectural contract contained the above-quoted language. Therefore, because the contract specified the objective, the failure of the architect to "diligently pursue and obtain" the project certification resulted in the claim asserted against *Vertex*. Here, instead of identifying the project objective in such broad terms, echoing contract language from the earliest cases discussed in detail, the *Southern Builders, Inc. v. Shaw Development* case,[xx] the parties would have been far better served by including specific performance objectives within the body of the contract that, if achieved, would have been consistent with delivering the desired result under the LEED For Homes Program. While this case appears to have been resolved short of trial, by means of a settlement, it is nevertheless notable for the reasons stated as the grounds for potential liability.

The second case worthy of mention focuses on the use of innovative material technologies in the achievement of the green/sustainable project objective. *The Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co.*[xxi], focused on one of the very first LEED Platinum rated buildings in the country. The allegations raised in the *Chesapeake* case stemmed from certain "Parallams" beams made from wood waste and environmentally neutral coatings that were used in sealing the Parallams. When these beams began to prematurely deteriorate and permitted

water infiltration and damage to the building's structure due to exposure from the elements, claims arose regarding the products used and their suitability for construction. Notable among the various counts raised was a claim for negligent misrepresentation against Weyerhaeuser, the manufacturer of the Parallams. Included in the allegations were the following: that "Weyerhaeuser supplied information regarding its PolyClear 2000 treated Parallams with the intention that its products would be used in the construction of the Project"; that "Weyerhaeuser had a duty to transmit accurate information regarding the materials to be used in construction of the Project. The statements that PolyClear 2000 . . . was an adequate substitute for preservatives specified in the Contract Documents, or was otherwise adequate for use in exterior exposed applications were untrue and constituted material misrepresentations or omissions;" that "Weyerhaeuser, with its superior knowledge, was negligent in the assertion of these untrue statements;" that "Weyerhaeuser also knew that PolyClear 2000 was not intended for exterior weather-exposed applications;" and the "statements or omissions made by Weyerhaeuser were made with the intention of having Plaintiffs act and rely upon them and Plaintiffs did in fact rely on Weyerhaeuser's statements or omissions." All of these and similar contentions were raised as the basis for liability on the part of Weyerhaeuser. Ultimately, however, a much more traditionally grounded statute of limitations defense was utilized to dismiss all claims against Weyerhaeuser.

On March 23, 2012, Judge Williams, the United States District Court Judge from the District of Maryland reviewing this case, entered a Memorandum Opinion granting Weyerhaeuser's Motion for Summary Judgment on statute of limitations grounds. The court focused on a 2001 report expressing concerns about the use of the Parallams as an exposed element of the building. The court also noted that water leakage investigations continued into

2002 noting the existing damage to the Parallams and statements that the treatment and coatings system used failed to protect them. Weyerhaeuser rejected these concerns after notification commenting that the Parallams had been properly treated and were appropriate for use on the project in the manner specified. The court then noted that "[r]oughly half a decade passed after the above-described course of events" and that "[i]n 2009, during an annual inspection, [the Foundation] allegedly discovered for the first time that the Parallams were deteriorating." Disputes then ensued over the responsibility for the deterioration of the Parallams and litigation followed. While there were other allegations and intervening pleadings filed by and between the various participants in the case, ultimately Weyerhaeuser filed a Motion for Summary Judgment arguing that the statute of limitations began to run on the Foundation's claims no later than May 2002, when it had received the reports concerning the Parallam beams. Even though Weyerhaeuser rejected the conclusions of these reports, Weyerhaeuser now contended that Plaintiffs were put on actual and inquiry notice of potential claims at that point. Therefore, because more than three (3) years passed before Plaintiffs initiated the case against Weyerhaeuser, the suit was time barred on statute of limitations of grounds. After identifying the appropriate standard of review on summary judgment, and concluding that Maryland law would apply to the action, the court evaluated the statutes of limitation applicable to all of the claims asserted against Weyerhaeuser and in each instance concluded that the statutes of limitation would bar both the claims in contract as well as in tort arising out of and related to this project. In particular, the court pursued a lengthy discussion of the discovery rule and to what extent and at what point in time the plaintiffs had actionable knowledge regarding the claims against Weyerhaeuser. Focusing on the conclusions identified in the 2001 and 2002 reports on the Parallams, the court observed that the plaintiffs were on "inquiry notice of the potential cause

and general nature of the damage to the Parallams" after submission of the 2001 report. Accordingly, the court held that the causes of action accrued in May 2001 and no later than May 2002 and thereafter expired in May 2004 and absolutely no later than May of 2005. The court stated as follows:

> The foregoing discussion demonstrates that Plaintiffs had inquiry notice of the probable cause and general nature of some manifested injury sufficient to create a colorable legal claim in May 2001. Having accrued on this date, Plaintiffs' cause of action expired three years later in May 2004. Yet Plaintiffs filed the instant action almost seven years after this date. The discussion further demonstrates that Plaintiffs had actual notice of the probable cause and general nature of some manifested injury sufficient to create a colorable legal claim in May 2002, whereupon the three-year time bomb on their cause of action started to tick. Thereafter, assuming *arguendo* the Plaintiffs had no inquiry notice in 2001, their cause of action still would have exploded in May 2005. In this scenario, Plaintiffs nonetheless would have filed the instant action more than half a decade late.

Clearly, the lesson to be learned from the *Weyerhaeuser* matter is that issues such as those presented to the Plaintiffs in that case must be fully evaluated at the time the potential failure is suspected. Thereafter, the parties must be acutely mindful that despite diffusing responses regarding suspicions over performance, the time limits on the statutes of limitation applicable to claims associated with those projects may continue to run notwithstanding assurances that everything on the project is just fine and that the materials are performing as promised and expected. However, the *Weyerhaeuser* case also remains intriguing because the allegations were structured around the misrepresentations over the properties of the materials of construction and the adequacy of those materials to perform consistent with the project's green/sustainable objectives.

Another twist on the representation element coming to the forefront of litigation over green/sustainable projects comes from *Kinetics Noise Control, Inc. v. ECORE International, Inc.*[xxii] This case involved a dispute between product suppliers over flooring products. In

particular, a supplier of rubber acoustical products for flooring systems brought antitrust and false advertising claims against ECORE, a manufacturer and supplier of underlayment products alleging that ECORE fraudulently procured its patent, wrongfully enforced it and "almost exclusively enjoyed [the] increased demand for rubber acoustical underlayment, at the expense of [Plaintiff], its competitors, and the consumers in the industry." Reviewing the complaint filed in the case yields a considerable wealth of references to LEED, the proliferation of LEED among green/sustainable building segments, and an overall discussion regarding the force of the green/sustainable building movement. However, much like in *Weyerhaeuser*, the *Kinetics* case was dismissed on more "traditional" grounds, this time, for the lack of personal jurisdiction over the defendant, ECORE.[xxiii] Nevertheless, the common thread uniting this case with the other matters discussed is the representation element. As such, it is more than likely that representation claims will be at the forefront of future claims beyond the green looking glass.

As mentioned above, one more case worthy of discussion regarding the misrepresentation trend of claims involved the USGBC itself. On October 8, 2010, a case was initiated in the United States District Court for the Southern District of New York, at Case No: 10-CIV-7747. The plaintiff was Henry Gifford, "a consultant who provides advice on how to reduce energy costs," initially as a part of a class action against the USGBC among others. Shortly after filing the class action, which included allegations of misrepresentation, false advertising, monopolization and conspiracy, Gifford opted to join with him a number of other named plaintiffs asserting claims exclusively against the USGBC for false advertising under the Lanham Act, § 43(a)[xxiv], the New York Consumer Protection Act at §§ 349 and 350, and common law claims for false advertising and unfair competition and business practices. What was unique about the *Gifford* case, was that no specific project was at issue. Rather, the focal point of Mr.

Gifford's misrepresentation and false advertising claims was the USGBC (along with its LEED Rating System). Mr. Gifford challenged the USGBC contending that the LEED Rating System had been promoted to a point where it was being suggested that buildings designed and constructed to comply with LEED were superior to those not following LEED in terms of being healthy for its inhabitants and users, much more environmentally sensitive and, most importantly, much more energy efficient. Mr. Gifford asserted that these claims being made on behalf of LEED were false and actionable under various federal and state statutes focused on unfair competition, misleading advertisement and even wire fraud. In much more direct terms, Henry Gifford asserted that the USGBC's LEED Rating System amounted to false advertising, essentially misrepresenting the quality and character of the buildings delivered by following LEED. Interestingly enough, what came from the USGBC's response by virtue of its Motion to Dismiss Mr. Gifford's Amended Complaint, was that LEED was never to be intended to be what Mr. Gifford asserted, but rather was "purely voluntary" in nature. Also of significance was the USGBC's statement that LEED was and is "aimed in improving environmental performance and does not assess actual . . . . performance" in buildings reviewed for certification. Based on the above, the USGBC then proceeded to argue that LEED does not verify building performance, just that these buildings are being "designed and built using strategies aimed in improving" buildings.

The USGBC then asserted regardless of what LEED was and was not, Mr. Gifford, who is in the business of designing high performance buildings, was really not the best plaintiff to challenge the USGBC or LEED. Therefore, the USGBC argued that Mr. Gifford did not have standing under the federal Lanham Act. The USGBC added that Mr. Gifford could not raise any

claims against the USGBC under the New York statutes because LEED was not a consumer orientated product, and was instead marketed to "businesses and professionals."

On August 15, 2011, Judge Sand issued the court's Memorandum and Order on the USGBC's Motion to Dismiss.[xxv] The court held that the plaintiffs, including Mr. Gifford, did not have standing to pursue any of the federally-based claims against the USGBC. Then, with the federal claims dismissed, the court exercised its discretion to not maintain jurisdiction at the federal level over the remaining claims grounded in New York state law. However, the nature of the latter dismissal without prejudice meant these claims could be reasserted in the state court, an action which has not yet come to pass despite a year since the dismissal by Judge Sand.

Nevertheless, the case is notable for several reasons. While Judge Sand began his decision observing that "Plaintiffs are professionals in the environmental engineering and design industry," he did not find that status to be sufficient to provide those plaintiffs standing to advance the Lanham Act claims against the USGBC. In the court's view, these activities did not put the plaintiffs in competition with USGBC. This conclusion by the court sets the stage for a strong defense by the USGBC in further actions by similar plaintiffs. Namely, under the court's view, unless the future plaintiff is a party in the business of providing green building rating systems, it is unlikely to achieve a standing status sufficient to pursue a Lanham Act claim.

The second notable observation from the court's opinion is Judge Sand's endorsement of the USGBC's contention that "the 'LEED certification process does not assess the *actual* environmental performance for any structures for which certification is sought or granted', but certifies that they were designed in a way that should result in better performance." The court added "the USGBC advertises and promotes LEED for the purpose of encouraging the expanded use of the certification system." These quotations are remarkable because the court very

narrowly defined the purpose of LEED as well as the USGBC's efforts to support and promote it, making it difficult to challenge the USGBC's efforts as misleading.

Nevertheless, due to the court's determination that the plaintiffs could not establish themselves as competitors of the USGBC, they would have to make a "more substantial showing of injury and causation to satisfy the reasonable basis prong of the standing requirement" for a Lanham Act claim. The court concluded, however, that building owners were free to choose from many consultants – even those who are not accredited by LEED – to design a LEED – certified project. Furthermore, the court held these plaintiffs were unable to prove any owner's decision had been influenced by the alleged false advertising by the USGBC. By concluding "Plaintiffs plainly do not compete with the USGBC in the certification of 'green' buildings or the accreditation of professionals" and in the process narrowly defining what the USGBC does and does not do, the court placed sizable obstacle in front these and any future plaintiffs seeking to confront the USGBC or LEED. Nevertheless, the seed that has been planted with the *Gifford* decision is one of misrepresentation being the potential source of liability for the USGBC or any entity who chooses to represent the character and quality of a green sustainable building as superior to those involving traditional construction models. Perhaps the solution to this developing trend lies with focusing on an underlying performance criteria in a much more traditional sense and providing appropriate qualifications that the ultimate performance of these buildings will be confined to utilizing the resulting building in the manner specified by the designers, the constructors and the suppliers of the building's design, construction and material components, respectively and collectively.

IV. EVALUATING A CONTRACTUAL SOLUTION AND EXIT FROM THE RABBIT HOLE

Responding to the challenge placed before it by the incorporation of green and sustainable elements in design and construction undertakings, the legal community began to assess the contractual facets of this process. Many practitioners who addressed traditional construction contract issues, along with evaluating the emergence of green and sustainable development technologies quickly recognized that the contracts presently in use on construction projects would have difficulty in dealing with the additional responsibility features and risk elements presented with a green/sustainable project path.[xxvi]

One of the earliest steps in the evolution of construction documents was the American Institute of Architects ("AIA") Document B214-2007, Standard Form of Architect's Services: LEED® Certification. This was a document intended to be utilized in combination with existing architectural agreements when the architect's services were also to include professional advice, assistance, and performance related to seeking and obtaining LEED Certification. In fact, the unique aspect of the B214-2007 was that it referenced LEED Certification as the contract's focus.

While the B214-2007 was certainly a good first step toward recognizing issues to be addressed on at least a LEED – centric Project, it was not designed to address consequences associated with *failing* to achieve LEED Certification. In specifics, the B214-2007 identified those services to be provided by the Architect consistent with obtaining LEED Certification. For example, it provided for preparation of specifications for construction documents. However, it did not elaborate on the specific LEED, green or sustainable requirements to be incorporated into the construction documentation.

Perhaps as a result of some of the earlier experiences associated with use of the B214-2007, the AIA very recently announced the release of the AIA Document B214-2012 Standard Form of Agreement of Architect's Services: LEED Certification ("B214-2012"). This revision contained well over 300 distinct changes to the prior version of the B214-2007. While, admittedly, some of these modifications were in the nature of renumbering, or other similar modifications of a minor nature, there were also substantial references, additions, definitions, and other language changes incorporated into the newest version of the B214-2012.

As a part of the more substantive modifications, specific references are made to the GBCI as the entity administering the LEED Certification process and there is a specific "check-the-box" reference to specify whether the architect or the LEED - consulting architect would be the entity responsible for submission of the necessary construction documents and other documentation required to obtain the LEED Certification. *See* B214-2012 at § 1.2. Article 2 then discusses in detail some of the LEED Certification services anticipated to be performed under the B214-2012 approach. These services include providing the owner with all agreements required by the GBCI or the USGBC to register the project and to position it for anticipated LEED Certification. Thereafter, there are references regarding a LEED Workshop (during which the LEED objectives for the project will be discussed), the LEED Certification Plan (developed as a result of the discussions of the LEED Workshop), the LEED Project Registration and submission of the necessary certification documentation to the GBCI and, as applicable, LEED Certification drawings and specifications, LEED Certifications services during bidding and negotiations, and LEED Certification services during construction. Here, a distinction is drawn between where the services are being performed by the prime architect versus the LEED -

consulting architect. Each selection follows its own path and sets forth the obligations of that design person or entity on the Project seeking LEED Certification.

Interestingly, Section 2.9 of the B214-2012 incorporates a new concept departing from its predecessor and accommodating the reality that "Substantial Completion" of a project in the traditional sense is no longer one hundred percent applicable in a LEED Certification context. In particular, Section 2.9.1 states: "[f]or purposes of this Standard Form of Architect's Services, Substantial Completion shall be defined in accordance with AIA Document A201™ – 2007. Verification that the Project has achieved LEED Certification, or the actual achievement of LEED Certification, shall not be a condition precedent to the issuance of a Certificate of Substantial Completion." Thereafter, Section 2.9.2 provides that if the Architect's services have not been completed within a selected number of months after the date of Substantial Completion, "through no fault of the Architect," the extension of the Architect's services shall then be compensated as an Additional Service under the AIA's remuneration approach. Thereafter, in Article 3, there is a more detailed description of Additional Services, along with addressing the circumstance where additional LEED Certification Services are necessitated by a change in initial information given on the project or editing of prepared Instruments of Service, including the LEED Certification Plan, "necessitated by changes in the requirements to achieve the LEED Certification goals established for the Project."

In Article 4, there is a discussion of the owner's responsibilities. Here, five (5) additional sections have been added requiring the owner to actively perform certain functions as it relates to the LEED undertaking, including the owner's obligation to advise the architect of proposed changes to the project which may affect the LEED Certification Plan.

The penultimate Article 6 in the B214-2012 contains some of the most significant modifications of this new B214 iteration. In Section 6.2, the owner and the architect are required to acknowledge that LEED Certification "is awarded by an independent third party organization, and is dependent on factors beyond the Architect's control, such as the Owner's use and operation of the Project; the work provided by the Contractor or the services provided by Owner's other contractors or consultants; or interpretation of LEED credit requirements by the GBCI. Accordingly, the Architect does not warrant or guarantee that the Project will be granted LEED Certification." Section 6.3 inserts a broad waiver of consequential damages running to the benefit of the architect primarily although its language is stated as mutual. Finally, Section 6.4 embraces the specific authorization of the architect to allow the owner to submit the architect's Instruments of Service either directly or indirectly to the USGBC or GBCI to comply with the requirements imposed by LEED Certification, notwithstanding existing proprietary ownership considerations.

Despite all of these substantial revisions to the B214-2012, it is clear that the consequences associated with a failure of the project to achieve the desired LEED result remains largely with the owner as the AIA has essentially eliminated the architect from the potential liability equation in the newest revisions to the B214-2012. What is also interesting about the release of the B214-2012 is that it was accompanied in its launch by no less than five (5) new members of the AIA family of Contract Documents. Included among the newest members of the family are the following:

> A101-2007 SP Standard Form of Agreement Between Owner and Contractor for use on a Sustainable Project Where the Basis Of Payment Is a Stipulated Sum;
>
> B101-2007 SP Standard Form of Agreement Between Owner and Architect for use on a Sustainable Project;

A201-2007 SP General Conditions of Contract For Construction for use on a Sustainable Project;

C401-2007 SP Standard Form of Agreement Between Architect and Consultant for use on a Sustainable Project;

A401-2007 SP Standard Form of Agreement Between Contractor and Subcontractor for use on a Sustainable Project.

These documents, discussed in more detail below, are specifically tailored to be utilized on sustainable projects and, in fact, a significant feature of all of these documents is the incorporating of a "sustainability" definition into the contractual structure.

What is interesting about the release of these new documents is not only what is contained in them, but also that they were released shortly after the very comprehensive green sustainable guide document was issued by the AIA, namely, Document D503™-2011 ("D503" or "Guide").[xxvii] The D503 was fully titled as the "Guide For Sustainable Projects, including Agreement Amendments and Supplementary Conditions." As such, it was not a new member of the AIA family of documents *per se*, but rather recommendations, proposed modifications and strategies to be employed when pursuing a project meeting the definition of "Sustainable" as set forth by the AIA. This document was different than the ConsensusDOCS 310 Green Building Addendum ("GBA") which was issued in late 2010 and was designed to be an addendum that could be made a part of various contract documents on a given project. The GBA could be and was meant to be appended to the architect, contractor and subcontractor documents, all with the desired intent of identifying to each of participants the green objectives for the project and the responsibilities to be undertaken by each of them in connection with achieving the green goals selected.[xxviii]

In AIA parlance, and despite the prior release of the B214-2007 and the selected modifications to the B101-2007, the AIA did not yet have contractual agreements or language

that would address in specific detail requirements for design and construction of a green/sustainable project, including those projects seeking LEED Certification. In fact, prior to the release of the D503, the AIA expressed that it did not consider issues implicated by USGBC's LEED Online™ for Version 3 (2009) ("LOL3") to be addressed by the then-current stable of AIA documents. As part of the discussion, the AIA noted certain concerns regarding the various registration documents and their potential impact to the project and its owner. For example, the AIA observed that the Project Registration Agreement utilized by the GBCI limits monetary exposure of the agency and excludes simple negligence and breach of contract liability. Furthermore, the AIA commented that the LEED Project Certification Agreement, required to begin the project certification process, contained similar limitations on liability and added certain indemnity obligations running in favor of the GBCI and the USGBC.[xxix] The AIA finally raised that the Confirmation of Agent Authority Document, typically signed by the architect, made the architect the owner's agent and placed a great deal of responsibility on the owner (e.g., holding the owner accountable for the architect/agent's actions).

Included in the D503 was a link to a PowerPoint presentation developed and delivered by Timothy R. Twomey, Vice-President and Deputy General Counsel of RTKL Associates, Inc. This presentation, entitled "LEED Online Version 3 Be Wary of Its Agreements", goes through concerns over provisions of LOL3 in some detail and how that registration may impact not only the architect, but also the project and, of course, the owner. What follows are over 60 slides developed to address specific sections of the LOL3 program, concerns about LOL3 requirements and, in some more limited respects, possible steps to address these concerns. An example raised by Mr. Twomey's presentation is that the LOL3 program requires an owner have sufficient rights in the relevant design documents to grant a license to the GBCI. This requirement was in stark

conflict with the underlying AIA contract documentation containing language typically vesting that ownership in the design professional (therefore, non-delegable or non-transferable by the owner of the project to the GBCI or any others). This specific example is in fact addressed by the AIA in the B214-2012 as well as the modifications incorporated into the new "Sustainable Projects" branch of the AIA family of documents. Nevertheless, the D503 begins with an introduction discussing the purpose of the Guide. Following a typical disclaimer of responsibility for legal purposes, the D503 opens by stating "Sustainable design and construction is a rapidly evolving area of importance to Owners, Architects, Contractors and others involved in the design and construction industry." Then, the AIA observes and recognizes "[n]ew building codes and certification systems attempted to define, and often placed different parameters around, what is required for a building Project to be considered 'sustainable' . . . . Green Building codes, such as the 2010 California Green Building Standards Code, establish mandatory baselines for energy and environmental performance that all building Projects are required to meet. . . . Often, these requirements cannot be achieved without each of the Project participants accepting new roles and responsibilities on the Project." Based on just these two quoted statements, the AIA is acknowledging two significant points that have become synonymous with green/sustainable design and construction. The first is that many of these green requirements are finding their way from being voluntary to mandatory as these voluntary programs are being incorporated into building codes. The second point, evident from the D503 and the new Sustainable Projects family of documents, is that the AIA itself is recognizing green/sustainable design and construction do require new and different approaches than their traditional design/construction counterparts. This is not simply new wine in old bottles as once

suggested by the USGBC, but rather truly a new breed of designing construction as opposed to a repackaging of traditional construction under and with new labels and terminology.[xxx]

Following this introduction, the D503 begins an article by article treatment of the suggested approaches toward revision of AIA documents for Sustainable Projects. Therefore, it appears to have been superseded by the actual Sustainable Projects family of documents. Nevertheless, it is worthwhile to note that in the AIA's own words, the "word sustainable is used in this Guide to describe Projects that incorporate design and construction practices that are intended to offer benefits to the environment, enhance the health and well being of building occupants, or increase energy efficiency. As used in this Guide, the term 'sustainable' is synonymous with other terms to describe environmentally responsible design and construction nomenclature such as 'green design and construction' or 'high performance building.'" As such, the AIA clearly has used this definition as a means to "guide" the users of the AIA family of documents toward the AIA view of what it construes to be "sustainable" design and construction.

Still, the D503 approach was not as substantial as the extensive definitions incorporated into the GBA. Perhaps, however, the D503 was another stepping stone by the AIA into a more full scale assault and entry into the green contract documents community that came just a year later with the release of the new Sustainable Projects series of contract documents.[xxxi] Unlike the B214-2007 or its newer B214-2012 iteration, the AIA expresses in the Guide that it "does not endorse any particular sustainability certification." Indeed, a review of the new Sustainable Projects family of documents does reflect that the AIA is at least attempting to broaden its support of sustainability beyond Projects pursuing a LEED Rating.

One element remaining strong within the D503 is the AIA's affirmation that the architect should be an advocate for environmentally responsible designs in its discussions with the owner

and its overall project-based approach. Indeed, having the opportunity to reflect upon nearly 5 years since the issuance of the B101-2007 containing language requiring the architect to have sustainable discussions with the owner and to pursue sustainability-supporting design approaches, the AIA appears to have wholeheartedly re-endorsed its decision with the issuance of the D503 (as well as issuance of the Sustainable Projects family of documents).

The AIA does note that "categorizing the Architect's sustainable design services as Basic Services or Additional Services may be complicated by the fact that some jurisdictions have established sustainable or green building codes," but the AIA does not suggest modified language to address this evolution. Instead, the AIA states "it is still important to outline a clear scope of services in the Owner/Architect Agreement regarding the architect's sustainable design duties and those to be undertaken by the Owner and its consultants." Here, the AIA could have included an obligation to recognize and accommodate code requirements either as a representation by the owner to the architect (an obligation some owners are not well equipped to execute) or as a part of the overall contracting process along with the recognition that, if required by law, the green/sustainable design elements would be included as a part of Basic Services.

The Guide also appears to address another concern often raised with regard to Sustainable Projects, particularly those using the LOL3 or other LEED Certification pathways. Initially, the Guide observes "[m]aintaining LEED Certification may also be dependent on the proper operation of maintenance of the Project by the Owner following construction." Then, the AIA states "because of the necessity of meeting all of these requirements, the Architect is not in a position to guarantee or warrant that the certification will be achieved." As a result, the D503 proposes model language to set forth among other things those concepts as well as a more

affirmative disclaimer that the "Architect does not warrant or guarantee that the Project will be granted LEED Certification by the GBCI." D503 at § 12.2.

The D503 does go into some detail about additional services to be considered as part of a sustainable project, including the Predesign Workshop, Sustainability Plan, Design Phase activity and a Guarantee of Performance. The problem with this suggested approach, however, contrasted with that of the GBA, is that not all of this language will be available or apparent to the other participants in the design and construction process. Rather, the information would appear only to be included in the Owner/Architect Agreement. Therefore, the other project participants remain "in the dark" and unclear as to what exactly it is that the architect has agreed to do for the owner in order to achieve the sustainable goal.[xxxii]

The Guide does include a very pertinent observation that is becoming recognized as a substantial difference on green/sustainable projects, namely that these projects often require the use of untested materials and equipment. Here, the D503 notes that it is necessary for the architect to limit its "liability for a failure of the product to perform in accordance with the manufacturer's representations." This language echoes what potentially could have been a key focus of the *Weyerhaeuser* case, had it not been dismissed on statute of limitations grounds.

Next, a more curious example is presented as suggested model language to be added to the B101-2007. The AIA proposes adding Subsection .13 to Section 4.3.1 which sets forth the following:

> Assistance to the Owner or Contractor with the preparation of Documentation for Certification for which the Owner or Contractor are responsible pursuant to the Sustainability Plan.

Unless the Sustainability Plan is specifically incorporated as a part of the owner's contract with the contractor, it is uncertain whether or not the contractor will ever learn of the

architect's belief and view that it is the contractor who may ultimately bear the responsibility for the documentation required to achieve certification.[xxxiii]

Having said that, there is language in the Guide that appears to make the owner responsible for including the Sustainability Plan as part of the Contract Documents and the contractor's services. Furthermore, the AIA then suggests language obligating the owner to provide the architect with "information relevant and necessary for achievement of the Sustainable Objective, including . . . operation and maintenance manuals . . . operation costs . . . [and] pertinent records relative to historical building data, building equipment and furnishings . . . ." This language appears to be directly pointed to satisfying the energy usage data disclosure requirements present in the LOL3 program.

The consequential damage approach of the D503 is very consistent with the AIA's approach in its other agreements, including the new Sustainable Projects iteration. In fact, the AIA emphasizes in the D503 that the mutual waiver of consequential damages should not be modified without due consideration. It then recommends an addition in Section 8.1.3.1 to the B101-2007 stating that the mutual waiver of consequential damages should specifically cover damages "resulting from failure of the Project to achieve the Sustainable Objective or one or more Sustainable Measures including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker's productivity."[xxxiv]

The Guide then turns to a discussion of modifications to the agreement between the owner and general contractor and the A201 General Conditions. While the Sustainability Plan is to be incorporated as part of the Contract Documents, it does not appear that the D503 approach allows for much input by the contractor into the development of the Sustainability Plan itself, contrasted with the more collaborative approach undertaken under the GBA model. Instead, the

D503 imposes a much more affirmative obligation on the contractor stating that it "shall perform those Sustainable Measures specifically identified as the responsibility of the Contractor in the Sustainability Plan or as otherwise required by the Contract Documents." D503 at §3.1.4. Similarly mandatory modifications of the A201 are then recommended for Sections 3.4.2.1 and 3.5.2.

Regarding the substantial completion/final completion paradox that occurs when pursing a sustainable project requiring certification review or rating some period of time after physical completion of construction, the owner is left with little more than a suggestion that the owner can find protection in the form of a performance bond or extended warranty where actions still need to be taken in order to address the Sustainable Objectives for the project following physical completion of construction. At most, the Guide suggests language be added to Section 9.8.1 of the A201 that the "Contractor shall submit Documentation for Certification required from the Contractor by the Contract Documents no later than the date of Substantial Completion." However, while the AIA appears to give with one hand, it takes away with the other by emphasizing "[v]erification that the Project has achieved the Sustainable Objective, or the actual achievement of the Sustainable Objective alone, shall not be a condition precedent to the issuance of Certificate of Substantial Completion in accordance with Section 9.8.4."

One other notable modification contained in the Guide urges a maximum dollar amount of liability be inserted into the construction documents "for any failure to perform a Sustainable Measure or failure of the Project to achieve the Sustainable Objective, including breach of contract or negligence not amounting to a willful or intentional wrong." Finally, there are appendices included in the D503, including Appendix D dealing with "Special Terms and Conditions imposed by Third Party Certification or Rating Entities . . . and in particular GBCI

and USGBC." This Appendix should be reviewed in detail as it discusses some of the concerns the AIA has with the LOL3 approach.[xxxv]

V. IS THE GUIDE DESTINED FOR EXTINCTION?

What will remain of the D503 will be very interesting following issuance of the five (5) new sustainable Project documents mentioned above. These new "SP" family of documents are stand-alone documents that could be utilized without regard or reference to other AIA documents or even the B214-2012 document. In fact, it should be emphasized that the AIA itself does not recommend using the B214-2012 in connection with the SP series of documents. Likewise, unlike the SP counterparts, the B214-2012 remains unique in that it is only meant for LEED projects.[xxxvi]

Immediately remarkable is that contained in all of the new SP series of documents are definitions regarding "Sustainable Measures" and "Sustainable Objective" for the Project. The AIA acknowledges that it did not want to define sustainability in the D503. However, it became apparent to the AIA that with the nature of green/sustainability becoming more mandatory in nature, through the adoption of codes specifically requiring green/sustainable elements, resisting any commitment to a particular definition was proving more and more difficult. Another feature of the SP series of documents was to provide a clear understanding of each party's responsibilities and their roles in the process. In this respect, it is much like the approach undertaken by the GBA nearly two years earlier.

VI. THE SP FAMILY OF DOCUMENTS: AN OVERVIEW

As noted above, with this recent issuance of a specific Sustainable Projects series of documents into the AIA family, the AIA is embarking on a dedicated effort to support sustainable design and construction in earnest. In fact, each of these documents contain differing

degrees of language and concept changes dedicated to accommodating not only the unique issues arising on these projects, but also to address voices of concern raised along the way following the issuance of the original B214-2007, the 2007 modifications to the B101-2007 and even since the issuance of the Guide.

A. THE B101-2007 SP

As one would perhaps expect, the most substantial modifications made in the SP series of documents are found in the Owner/Architect Agreement. Now, instead of just the architect's Basic Services being identified, there is a distinct and comprehensive description of "Sustainability Services" described as a part of the architect's undertaking. The heart of these Sustainability Services are set forth in Section 3.3 and the subsections that follow. Included among the subsections are discussions of Sustainability Certification Agreements, a Sustainability Workshop to be participated in by the owner and its consultants along with the architect, Sustainability Plan Services and the architect's Sustainability Services that are to be performed in the design, construction and certification phases of the project.

Key language is found in Section 3.3.5.2 relating to the design phase of the work. This Section includes language clearly defining the extent of the architect's responsibility to the owner:

> As part of the Sustainable Measures, the Project may require the use of materials and equipment that have had limited testing or verification of performance. The Architect may be unable to determine whether the materials or equipment will perform as represented by the manufacturer or supplier. The Architect shall discuss with the Owner the proposed use of such materials or equipment and potential effects on the Sustainable Objective that may occur if the materials or equipment fail to perform in accordance with the manufacturer's or supplier's representations. The Owner will render a written decision regarding the use of such materials or equipment in a timely manner. In the event that the Owner elects to proceed with the use of such materials or equipment, the Architect shall be permitted to rely on the manufacturer's or supplier's representations and shall not be responsible for any damages arising from the failure of the materials or

equipment to perform in accordance with the manufacturer's or supplier's representations.

While this section is notable in that it addresses the emerging technologies issue, it places a great deal of responsibility on the owner, who may not always be the most sophisticated party in the design and construction equation. Nevertheless, the owner is left with the responsibility by the AIA under the SP documents for choosing and using materials that may not yet be proven by the test of time.

In the construction phase, Section 3.3.6.1 requires the architect to notify the owner of known deviations from the contract documents and deficiencies or defects in the work that the architect recognizes will impact achievement of the Sustainable Measures. Thereafter, the architect is required to meet with the owner and contractor to discuss alternatives to remedy the condition.

Additionally, in Section 3.3.6.2, the architect is obligated to notify the owner of the impact of a proposed change in the work on a Sustainable Measure or achievement of the Sustainable Objective. Of equal importance, but subject to additional compensation, the architect is to provide responses to contractor's RFIs "to describe how a product, material or equipment was intended to satisfy the requirements of the Sustainable Measure or contribute towards achievement of the Sustainable Objective." In this way, this Section does begin to accommodate a more collaborative approach toward achievement of the project's sustainable goals.

Registering the project and collection of sustainability documentation is clearly a role to be fulfilled by the architect under the B101-2007 SP document. However, Section 3.3.7.7 emphasizes "[a]ny certification, declaration or affirmation the Architect makes to the Certifying Authority shall not constitute a warranty or guarantee to the Owner or the Owner's contractors or

consultants." The potentially long time between Substantial Completion of site activities and the certification process itself is addressed in Section 4.3.5 which allows for additional compensation in the event that the time frame between Substantial Completion and final sustainability services identified by the parties is exceeded. Section 5.13 through 5.17 emphasizes the owner's responsibilities as a part of the achievement of the Sustainability Plan, Sustainable Measures and the overall Sustainable Objective. The owner is required to (a) advise its contractors and consultants to perform services in accordance with the Sustainability Plan; (b) provide the architect any information requested by the architect that is relevant and necessary for achievement of the Sustainable Objective; (c) comply with the requirements of the Certifying Authority regarding ownership, operation and maintenance of the project during the construction and following completion; (d) be responsible for preparing, filing and prosecuting appeals to the Certifying Authority; and (e) provide services of a commissioning agent, unless that service is specifically engaged from the architect.

Much the same as in the D503, Article 7 modifies the copyrights and license provisions contained in the AIA documents to allow for the owner to have a license to provide the Instruments of Service to the Certifying Authority. Also similar to the D503, Section 8.1.3.1 includes a broad mutual waiver of consequential damages including for "failure of the Project to achieve the Sustainable Objective, or failure to achieve one or more Sustainable Measures, including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker productivity."

One last notable modification occurs in Article 10, Miscellaneous Provisions. Section 10.9 provides as follows: "[t]he Owner and Architect acknowledge that achieving the Sustainable Objective is dependent upon many factors beyond the Architect's control, such as

the Owner's use and operation of the Project; the Work provided by the Contractor or the work or services provided by the Owner's other contractors or consultants; or interpretation of credit requirements by a Certifying Authority. Accordingly, the Architect does not warrant or guarantee that the Project will achieve the Sustainable Objective." Perhaps it is this last modification that, beyond all others, distinguishes the architect's role or responsibility on a sustainable project from those on a traditional design undertaking. Here, language such as that incorporated into Section 10.9 will likely be utilized directly by architects to avoid responsibility for the project not achieving the ultimate goals specified in the earliest green/sustainability planning process.

B. THE AIA DOCUMENT A201™-2007 SP

The document containing the next most amount of modifications is the A201™-2007 SP General Conditions of the Contract for Construction for use on a Sustainable Project ("A201-2007 SP"). At the outset, in Article 1, Section 1.1.9 contains the following "Special Definitions:"

> § 1.1.9.1 Sustainable Objective - The Sustainable Objective is the Owner's goal of incorporating Sustainable Measures into the design, construction, maintenance and operations of the Project to achieve a Sustainability Certification or other benefit to the environment, to enhance the health and well-being of building occupants, or to improve energy efficiency. The Sustainable Objective is identified in the Sustainability Plan.
>
> § 1.1.9.2 Sustainable Measure - A Sustainable Measure is a specific design or construction element, or post occupancy use, operation, maintenance or monitoring requirement that must be completed in order to achieve the Sustainable Objective. The Owner, Architect and Contractor shall each have responsibility for the Sustainable Measure(s) allocated to them in the Sustainability Plan.
>
> § 1.1.9.3 Sustainability Plan - The Sustainability Plan is a Contract Document that identifies and describes: the Sustainable Objective; the targeted Sustainable Measures; implementation strategies selected to achieve the Sustainable Measures; the Owner's, Architect's and Contractor's roles and responsibilities

> associated with achieving the Sustainable Measures; the specific details about design reviews, testing or metrics to verify achievement of each Sustainable Measure; and the Sustainability Documentation required for the Project.
>
> § 1.1.9.4 Sustainability Certification - The Sustainability Certification is the initial third-party certification of sustainable design, construction, or environmental or energy performance, such as LEED®, Green Globes™, Energy Star or another rating or certification system, that may be designated as the Sustainable Objective or part of the Sustainable Objective for the Project. The term Sustainability Certification shall not apply to any recertification or certification occurring subsequent to the initial certification.
>
> § 1.1.9.5 Sustainability Documentation - The Sustainability Documentation includes all documentation related to the Sustainable Objective or to a specific Sustainable Measure that the Owner, Architect or Contractor is required to prepare in accordance with the Contract Documents. Responsibility for preparation of specific portions of the Sustainability Documentation will be allocated among the Owner, Architect and Contractor in the Sustainability Plan and may include documentation required by the Certifying Authority.
>
> § 1.1.9.6 Certifying Authority - The Certifying Authority is the entity that establishes criteria for achievement of a Sustainability Certification and is authorized to grant or deny a Sustainability Certification.

Clearly, the AIA has committed itself with the definition of these terms to make certain that all contracting parties are aware of the same terminology and the terminology's importance to the overall Sustainable Objective. As the remaining modifications to the A201-2007 SP are reviewed, it is apparent that the Sustainability Plan is a key focal point of the overall Sustainable Objective for the project. Sections 2.2.6 and 2.2.7 contain specific references to owner obligations set forth in the Sustainability Plan and by the Certifying Authority relating to the ownership, operation and maintenance of the project both during construction as well as following project completion. In Article 3, the contractor is given responsibility of following the Sustainability Plan, including performing the Sustainable Measures identified therein as the responsibility of the contractor. See A201-2007 SP at §3.1.2.

Section 3.2.2.1 obligates the contractor to meet with the owner and architect to discuss alternatives in the event that the owner and architect recognizes a condition that will impact the achievement of a Sustainable Measure or achieving the Sustainable Objective. The Section goes on to state "if any condition is discovered by or made known to the Contractor that will adversely affect the Contractor's achievement of a Sustainable Measure for which the Contractor is responsible pursuant to the Sustainability Plan, the Contractor will prompt provide notice to the Architect and meet with the Owner and Architect to discuss alternatives to remedy the condition."

In Section 3.4.2.1 under the general heading of Labor and Materials, the contractor is obligated to provide with any requests for substitution a written representation identifying the potential impact that requested substitution may have on either the Sustainable Measures or Sustainable Objectives for the Project. The owner and architect are entitled to rely on these representations, although the contractor may request additional information from the architect describing how the product and material or equipment for which a substitution is proposed "was intended to satisfy the Sustainable Objectives for the Project, or a Sustainable Measure."

Section 3.11.2 can provide the contractor with the responsibility for "preparing and completing the Sustainability Documentation required from the Contractor by the Contract Documents, including Sustainability Documentation to be submitted after Substantial Completion." The remaining part of this Section goes on to discuss timetables for the delivery of that documentation.

Section 3.12.10.1 focuses on the issue of utilizing materials or equipment that have had "limited testing or verification of performance." Overall, while the contractor is required to provide certain information regarding the use of these materials and the potential impact on the

project's Sustainable Objectives, the owner is ultimately left to make the decision whether to use this material and, of course, bears the responsibility (under the AIA approach) for the failure of the project to achieve the Sustainable Objectives as a result of any material associated shortcomings. Much the same as the B101-2007 SP, the Owner is dealt a substantial amount of responsibility relating to the Project's green goals.

A specific section on cleaning and waste management is included in Section 3.15.2. Similar language is echoed in the A401-2007 SP subcontract document. A401-2007 SP at §§ 4.4.1-4.4.2.

Section 4.2.8 acknowledges the possibility that change orders or construction change directives may impact the project's Sustainable Objectives. Accordingly, "[i]f the Architect determines that the implementation of a proposed change would materially impact a Sustainable Measure or the Sustainable Objective, the Architect shall notify the Owner, who may authorize further investigation of such change." Once again, the responsibility appears to land on the owner's desk in terms of ultimately deciding the sustainable fate/consequences of the project.

Very much similar to the approaches suggested in the D503, modifications are made to Section 9.8.1 regarding Substantial Completion not being dependent upon achievement of the Sustainable Objective, Section 9.10.1 states that achieving the Sustainable Objective is not a condition precedent to getting the final Certificate of Payment, and Section 15.1.6 specifically includes within the waiver of consequential damages "damages resulting from failure of the Project to achieve the Sustainable Objective or one or more of the Sustainable Measures including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker productivity."

C. THE REST OF THE FAMILY

The remaining members of the SP family of contract documents largely build from the substantial modifications made to the B101-2007 SP and the A201-2007 SP. In the A101-2007 SP, references are made to the term "Sustainability Plan" and the A201-2007 SP. As noted above, the A401-2007 SP makes similar references and also, in Section 4.4.2 requires the subcontractor "to the extent applicable to Subcontractor's Work, prepare and submit to the Contractor a construction waste management and disposal plan setting forth the procedures and processes for salvaging, recycling or disposing of construction waste generated from the Project." Finally, in the C401-2007 SP, Standard Form of Agreement Between Architect and Consultant For Use on a Sustainable Project, there is specific language included to the extent that the consultant is expected to assist or perform Sustainable Measures or assist in achieving the Sustainability Objective for the Project. Section 10.7 echoes that the consultant, like the Architect, is not responsible for achievement of the Sustainable Objective nor does the consultant warrant or guarantee achievement of the sustainable objective.

VII. A LEAGUE OF THEIR OWN?: THE DESIGN BUILD INSTITUE OF AMERICA'S SUSTAINABLE PROJECT GOALS EXHIBIT

Both the GBA as well as the AIA family of documents have not yet embraced a green/sustainable approach for the design-build delivery model. In fact, both have indicated qualifications expressly excluding design-build application for the GBA, the D503 or the newly issued SP family of documents. By contrast, the Design Build Institute of America ("DBIA") Sustainable Project Goals Exhibit is dedicated for use on design-build projects and with existing DBIA documents. The Sustainable Project Goals Exhibit is LEED - centric and the credits are to be identified in the Basis of Design Document. There are also legal requirements identified in the Exhibit placing the burden on the owner to identify sustainable laws, codes, rules or

standards. Finally, there is a remedy section that addresses consequences. Some of these consequences include waivers of claims, proposed liquidated damages and cure mechanisms to certain contractually dollar-stated limits. What is again notable though is the great deal of responsibility placed on the owner under the DBIA approach, much the same as the increased responsibility placed on the owner under the AIA's more recent SP document efforts. It appears that only the GBA's approach looks to allocate all responsibility a bit more evenly between the various project participants, each of whom have a significant role to play in successful achievement of a project's given green/sustainable goal.[xxxvii]

VIII. ARE SURETY BONDS THE ANSWER?

As the parties have searched for ways of managing or limiting the risks associated with green/sustainable projects, they have looked towards other project risk management mechanisms to potentially answer the challenges of green building. For a brief moment, it was thought that surety bonds could provide that needed gap protection to the owner. However, the surety industry quickly responded, with the Surety & Fidelity Association of America and the National Association of Surety Bond Producers suggesting a full disclaimer of any potential green/sustainable liability or exposure.[xxxviii] Because this reaction may have swung the pendulum too far in the other direction, leaving many contractors and owners completely unprotected for green/sustainable elements of performance under the construction contract, efforts were undertaken by some surety bond providers to address green/sustainable projects with more accommodating, but also very direct precision. Once such approach was to develop and attach a green/sustainable surety bond rider specifying that the surety would only have obligations for green performance requirements that had been expressly set forth in the contract, contract drawings or specifications, regardless of whether required by applicable law. Further,

the rider approach limited liability to terminations that were based on specific, stated, defined, objective, measurable and verifiable green performance requirements set forth in the contract documents, essentially excluding liability for interpretations made by a certifying agency such as the GBCI. Overall, the approach was to bond only objective and verifiable performance requirements set forth in the contract documents and not ratings or consensus standards. However, as green moves into the more mandatory phase of its existence as a parts of laws, codes, and regulations, even these bond forms will have to be revisited in order to more directly accommodate the scenario where the law requires green performance, particularly on public projects where the surety may be obligated under a statutory bond approach to cover the contractor's performance obligations (e.g., a statutorily-obligated public project performance bond).

IX: CONCLUDING THOUGHTS, SEEING DAYLIGHT FROM THE RABBIT HOLE

There was a time in the evolutionary process of contract documents on green/sustainable projects where each would had to have been extensively negotiated and manuscripted in order to accommodate and address the given risks and responsibilities on that particular green/sustainable project. Now, with the efforts of the AIA, ConsensusDOCS and the DBIA, there are many more resources from which to draw in addressing the unique risk/responsibility considerations on these equally unique projects. However, just when you thought you might know enough about what it took to go green, the translation of sustainable design/construction into mandatory terms will require continued contractual evolution to address these latest images appearing in the green looking glass.

[i] L. Carroll, *Through the Looking-Glass*, originally published in 1872.
[ii] *See, e.g.*, http://thetoweratpncplaza.com/TheTowerAtPNCPlaza.pdf; http://www.archiplanet.org/wiki/LEED_Platinum_Certified_Buildings
[iii] It is not the intention of this article to disregard the impact to the industry from other green rating efforts, including the Energy Star Program and the Green Building Initiatives' Green Globes Program. However, under the circumstances, and because the vast majority of effort and attention has been focused on the USGBC's LEED, we will consider this rating program more generically as the model that most green design and construction presently follow.
[iv] http://leeddaily.com/?p=11556.
[v] *Greening The Codes 2010*, available through www.usgbc.com. Interestingly, in a May 2011 update, this statement was modified as follows: ". . . 35 state governments and 14 federal agencies or departments had adopted LEED as a tool for benchmarking higher performance green building practices by May of 2011."
[vi] http://greensource.construction.com/news/2012/06/120605-gsa-brainchild-full-fees-after-building-hits-energy-use-targets.asp.
[vii] www.finance.yahoo.com/news/gsa-study-shows-green-building-144200709.html.
[viii] *See Compendium of Best Practices – Sharing Local and State Successes in Energy Efficiency and Renewable Energy from the U.S.* (April 2010).
[ix] *See* http://www.bsc.ca.gov/Home/CALGreen.aspx.
[x] *See* http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3109&ChapterID=5.
[xi] The IGCC can be reviewed in full detail at http://www.iccsafe.org/cs/igcc/pages/default.aspx.
[xii] *See*: http:\\www.iccsafe.org\newsroom\News%20Releases\NR-05102011-MDadoptsIgcc.pdf. *See also*: http://www.buildingonline.com/news/viewnews.pl?id=10528.
[xiii] *See* http://phoenix.gov/pdd/devcode/buildingcode/index.html.
[xiv] www.iccsafe.org/Store/Pages/Product.aspx?id=3750S12#longdesc.
[xv] *See* www.iccsafe.org/newsroom/News%20Releases/NR-04202011-IGCCRecentCodeAdoptions.pdf
[xvi] This concern is one that will continue in the absence of statutory/regulatory modification to allow for these codes to be updated along with the implementation of new iterations of the LEED Rating System. However, this may not end all uncertainty as changes in the LEED program also sometimes face internal challenges and struggles. For example, the newest version of LEED, namely, LEED 2012 has been long in coming, despite and perhaps due to over 22,000 comments made in the fourth comment period and an "unprecedented" fifth comment period which will run from October 2, 2012 to December 10, 2012. *See, e.g.*, http://archrecord.construction.com/news/2012/07/120720-Tumult-Grows-Over-LEED-Rating-System-Update.asp?WT.mc_id=rss_archrecord
[xvii] Some parties have opted for following LEED as a guideline for green sustainable performance of the project without undertaking the expense or uncertainty of the final certification process. This has been characterized as "LEED without the label," by some. However, for those who are about to consider such an undertaking, the 2009 LEED On-Line version must be reviewed carefully because it suggests strongly that such an approach is not approved by the USGBC as it would be contrary to the initial representations required to be given by the applicant at the time that the LEED On-Line process is started.

[xviii] While the focus of this article is understandably focused more on legal and contractual mechanisms of green risk control and reduction, it is one part of an overall green liability reduction strategy. For example, Negawatt Research published its "*Green Building Code Risk Mitigation Strategies*" in May 2011, discussing "Risks from the New Model Green Building Codes" and "Green Code Risk Mitigation Strategies," among other things. This article is available at www.negawattresearch.com.

[xix] *Bain v. Vertex Architects,* No. 2010 L012 695 Cir. Ct. Cook Co., IL.

[xx] The *Shaw* case was explored in detail in *Growing Demand for Green Construction Requires Legal Evolution*, *The Construction Lawyer*, Summer 2010 at p. 14.

[xxi] *The Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co.,* Civil Action No. 8:11-CV-00047-AW, 341442, Cir. Ct., Montg. Co. (Md 2010).

[xxii] *Kinetics Noise Control, Inc. v. ECORE International, Inc.*, 2010 WL 4449118 (C.D. Cal. 2010).

[xxiii] *See* 2011 WL 940335 (C.D. Cal. 2011).

[xxiv] Lanham Act at § 43(a), (15 U.S.C. § 1501, *et. seq*.).

[xxv] *See* 101 U.S.P.Q. 2d 2053, 2011 WL 4343815 (S.D. N.Y. 2011).

[xxvi] *See generally*, *Growing Demand For Green Construction Requires Legal Evolution, The Construction Lawyer* - Summer 2010 at pp. 17-20.

[xxvii] Separate and apart from the D503 and the B214-2007, the AIA had ventured into sustainability supportative language with its modifications to the AIA Document B101™-2007, Standard Form of Agreement Between Owner and Architect ("B101-2007"). The B101-2007, in particular, is not an agreement focused entirely or exclusively on green or sustainable projects. Rather, the B101-2007 is a basic design agreement to be utilized conceivably on most undertakings by architects. The B101-2007 does require that the architect "shall" discuss with the owner whether it would be feasible to incorporate sustainable elements into the project. Additionally, Section 3.2.3 states that "the Architect shall present its preliminary evaluation to the Owner and shall discuss with the Owner alternative approaches to design and construction of the Project, including the feasibility of incorporating environmentally responsible design approaches. The Architect shall reach an understanding with the Owner regarding the requirements of the Project." Furthermore, Section 3.2.5.1 provides that the "Architect shall consider environmentally responsible design alternatives, such as material choices and building orientation, 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 designs services under Article 4." Some reacted to this additional language as a game changer for the design community and certainly a major nudge by the AIA toward sustainable design and construction. One concern focused on whether most architects were in a position (from an experience perspective) to comply with the new contractual requirements and to engage an owner in a sustainable discussion required by the B101-2007 terms. This transitioned into a further concern over whether the AIA had with these modifications changed the standard of care by which architect's services would now be measured. Remarkably, the AIA observed in the D503 that the standard of care for an architect on these projects is indeed changing. The AIA states "[f]urthermore, as more jurisdictions institute green building standards by code, the Architect's standard of care may include requirements established by newly adopted code or practice. In other words, 'standard of care' is an evolving concept; as design professionals begin incorporating sustainable

design practices as Basic Services (either voluntarily or through jurisdictional requirements), the Architect's standard of care may eventually be construed to include those sustainable design practices as the accepted baseline standard of performance for the Architect."

[xxviii] The author participated in the creation of the GBA as the co-chair and a member of the drafting team.

[xxix] *See* LEED Project Certification Agreement at Article 16.

[xxx] A point and counterpoint on this subject can be found at: www.seyfarth.com/dir_docs/publications/AttorneyPubs/White%20Paper_DBlake.pdf; and http://www.jdsupra.com/legalnews/new-directions-are-the-leed-2009-requir-99772/, respectively.

[xxxi] Somewhat consistent with the GBA's approach is the AIA's recognition in the D503 that "[c]learly defining both the Owner's performance and certification goals, as well as any limitations to attaining those goals, is critical in setting expectations and realizing a successful sustainable Project." This language should be compared with the GBA's direct encouragement of discussion and dialogue between the GBA's Green Building Facilitator and the owner as to the green and sustainable approaches to be pursued on the project.

[xxxii] Again, by contrast, the GBA is intended to be presented to all project participants so that they can consider, plan and pursue the respective green/sustainable roles and responsibilities to be undertaken.

[xxxiii] It should be noted that the proposed model language for Section 1.1.9.3 of the B101-2007 states that the "Sustainability Plan will be incorporated as part of the Contract Documents." However, because the architect is defining and preparing the Sustainability Plan, it does not appear to accommodate much in the form of contractor input on what the contractor may or may not be able to provide in terms of documentation of certification.

[xxxiv] This proposed provision should also be contrasted with the approach taken by the GBA. While the GBA clearly identifies these similar types of damages as consequential in nature, the guidelines to the GBA encourage the project participants to consider this declaration directly as a part of its negotiation of the underlying contract documents and whether in each particular project's circumstance it would be prudent to waive all consequential damages. The language of the GBA provides a much more flexible approach than the AIA's admonition that "[u]sers are cautioned against executing any AIA Contract Document that has been modified to eliminate the mutual waiver of consequential damages language." This places the owner in a much more precarious position than the other project participants. In the sustainable context, the failure of the project to achieve the given energy performance or the rating recognition specified in the contract documents could have far reaching consequences, including return on investment considerations as well as for incentives tied directly to the LEED or other rating recognition. Having a mutual waiver of consequential damages, therefore, leaves the owner entirely unprotected and uncompensated by the other Project participants even though the owner may very well had paid a premium for architect and contracting services that were specifically tied to achievement of higher building performance in terms of energy usage and/or achievement of a LEED Certification or Green Globes rating level that would have allowed the Owner to obtain tax credits, permit-review acceleration or other similar regulatory advantage.

[xxxv] It should also be noted that while the D503 suggests pursuing LEED without a label path, namely pursuing LEED without going through the certification process, the LOL3 program itself requires the registrant to represent that it will endeavor in good faith to use commercially

reasonable efforts to pursue and achieve LEED Certification. This admonition is also included in the PowerPoint presentation incorporated by hyperlink into the D503.

[xxxvi] This point was raised in an online Webinar offered by the AIA on the Sustainable Project Contract Documents, https://live.blueskybroadcast.com/bsb/client/CL_DEFAULT.asp?Client=643475&ACTION=FAQs.

[xxxvii] The DBIA recommends the Sustainable Project Goals Exhibit be used with the DBIA Document 525 (Lump Sum 2009 Edition) or Document 530 (Cost Plus With GMP Option 2009 Edition).

[xxxviii] *See, e.g.*, http://www.constructionexec.com/Issues/November_2011/Special_Section7.aspx.