

[Random Thoughts on LEED Challenges and De-certification](#)



Here at Musings we have discussed the issues to do with LEED de-certification [because of energy reporting \(or lack thereof\) by the owner of the building](#). Remember the italicized portion of this last sentence, because the de-certification discussion has taken a new turn. Now, not only can the Owner of a building tank its LEED Certification through its own failure to comply with USGBC rules, the certification of a building can be [challenged by third parties](#). Hidden in the USGBC [LEED Policy Manual](#), is language granting [USGBC](#) the right to retroactively review a project's [LEED certification](#) level on either its own initiative or based upon the [complaint of a third party](#).

My fellow [construction attorneys](#) and friends Doug Reiser of the [Builder's Counsel Blog](#) (@douglasreiser on Twitter) and Chris Cheatham of the [Green Building Law Update](#) (@chrischeatham on Twitter) have discussed this policy and the [failed challenge](#) by a Wisconsin group to the LEED certification of a local high school. Both of these guys have asked some great questions and I recommend that you read their analysis.

My focus here, as always, is on the "on the ground" [risk management issues](#) for contractors and subcontractors on projects seeking, and in this case obtaining, LEED certification. The real issue here, from my perspective as a construction lawyer, is the further implication of [third party action](#) in the potential liability of the construction professional who constructs the building.

For the same reasons that contractors and subcontractors (and even architects and construction managers) need to structure their construction contracts to assure that failure of a building to meet certain energy benchmarks 3, 4 or even 10 years down the road does not come back to bite them, these same construction professionals must assure that their contracts shield them from the potential liability of LEED de-certification due to a challenge like that in Wisconsin. This policy by the USGBC creates more questions than it answers, for example, how will [insurance companies](#) and [bonding companies](#) deal with the totally uncontrollable possibility of a certification challenge? How will the ghost of liabilities future (like that mangled [Dickens](#) reference?) dampen the enthusiasm for sustainable construction overall?

The [Eeyore in me](#) fears that our much needed shift to sustainable, energy efficient building stock will be hindered by the worries of contractors. My hope (and, yes, I do have an optimistic side!) is that by asking these questions now, we can all work to deal with them and, with some luck and good planning, create a strong sustainable infrastructure that will be around for years to come.

This debate must continue. If you comment to one post here at [Musings](#), please make it this one because I truly do not have the answers to these questions. Because of the uncertainty relating to the legal aspects of this brave new building world, your input on this topic is invaluable.

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Please check out my [Construction Law Musings Blog](#) for more on Virginia construction law and other topics.