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Green Buildings Pose New Obligations and Potential Liabilities for Contractors

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From the Chairs

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During 2005, in Maryland's venerable Eastern Shore seaport town of Crisfield, an ambitious redevelopment project commenced at the City Dock. The Captain's Gallery is a luxury condominium complex consisting of a six-story building with 23 residential units, a heated pool, fitness center, boat slips, and a rooftop restaurant. One notable component of the project specifications called for the construction to result in a "Green Building" that would obtain a "Silver Certification" in accordance with the U.S. Green Building Council's Leadership in Energy and Environmental Design rating system, popularly known as LEED standards. In doing so, the developer intended to qualify for more than \$600,000 in tax credits.

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Captain's Gallery became a memorable project, not only because it was one of the first in Maryland to incorporate the LEED rating into the contract documents, but because it became one of first anywhere to result in litigation arising, in part, from the general contractor's alleged failure to comply with the environmental design standards. In the suit filed in the Circuit Court for Somerset County, the developer, along with other claims, sought damages for the loss of the tax credits as a consequence of the alleged failure of the building to meet the contractually specified LEED standards.

As the contractual adoption of environmentally related requirements becomes more common, as the result of increasing financial incentives, market forces driven by sustainable building benefits, and government mandates, issues as to whether the finished product comports with the applicable standards will surely follow. Potential liability flowing from green building standards can be expected to become an increasingly important issue in everything from the clarity of design documents, to inspection and supervision responsibilities, to standards of care, to insurance coverage, to warranty obligations, and to the propriety of the certification procedure.

The LEED rating system established by the U.S. Green Building Council is the best known, and the most often cited criteria for sustainable building development. Its credit system covers a wide range of design and construction procedures, and is intended to promote buildings that are both environmentally

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responsible and provide a healthy environment for occupants. Site credits promote such activities as managing storm water by reducing runoff and conserving natural vegetation, providing alternative transportation, and reducing light pollution. Water efficiency credits can be earned by creating a water efficient landscape, adopting innovative wastewater technologies, and reducing overall water usage. Energy credits are aimed at controlling energy waste, atmospheric conditions, and building impact through such methods as on-site renewable energy and enhanced refrigerant management. Materials credits encourage the use of renewable, recycled and recyclable components. And indoor air quality credits apply to such categories as ventilation, monitoring, the use of low-emitting materials, thermal comfort, and the availability of daylight and views.

Another widely recognized program is Green Globes, sponsored by the Green Building Initiative, which establishes a rating and certification system through an assessment protocol, software tools, and the use of profession assessors in the categories of energy, indoor environment, site impact, water, resources, emissions, and environmental management.

A project that intends to meet any of the LEED or Golden Globes requirements must have both specificity in the contract documents, and qualified construction oversight and supervision. The consequences of non-compliance can be enormous, especially if the applicable standards are used to determine (1) the availability of a tax credit; (2) compliance with a government mandate; or (3) form the basis for the project's ultimate marketing and representations as to the product that will be delivered.

Current federal tax credits include the Energy-Efficient Commercial Building Tax Deduction, the Energy-Efficient Home Tax Credit of Builders, and the Energy Credit of Solar Energy Property. Some states have green tax provisions as well. These incentives can become a measure of damages if the building fails to qualify.

There is also the growing prospect of more government mandated compliance. This year, the Maryland General Assembly passed Senate Bill 208, which adopted environmental requirements for new state buildings and public schools, and utilizes both LEED and Golden Globes standards. This will result in new contractual obligations and performance standards for contractors involved in state construction.

Finally, the positive image and desirability of sustainable construction continues to grow. From companies wanting to offer competitive work environments to employees, to owners seeking energy efficiency, to simple consumer environmental awareness, market forces are pushing the green building revolution. With that comes the potential for liability based on new and evolving standards of due diligence in ensuring that the design and construction are as green as intended.

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