

Second Annual Greenbuild Legal Forum Highlights Unique Challenges and Opportunities for Green Building Lawyers

By: Daniel J. Sheridan

On Thursday I attended [Greenbuild's](#) second annual [Legal Forum](#), and it did not disappoint. Organizers Susan Dorn (General Counsel to [USGBC](#)) and green building law pioneer Stuart Kaplow assembled an excellent panel to discuss topics ranging from litigation and green construction contracts to the latest insurance products and greenwashing. According to Susan, there are now approximately 1,100 LEED accredited professionals (LEED AP or LEED Green Associate) who now identify themselves as being related to the legal services industry. Granted, they are not all lawyers in private practice, and there are many more lawyers practicing green building law who are not LEED accredited. And while the number is modest in view of the total lawyer population in the U.S. (which, according to the American Bar Association, is approximately 750,000), it evidences the growing relevance of this legal specialty.

Leading off the presentations was David Blake of [Seyfarth Shaw's](#) Washington, D.C. office who discussed green building risks, laws and litigation. David offered a concise and informative summary of thirteen LEED-related disputes which have been either decided or filed since 2007. In this wide array of cases, there is an extraordinarily diverse group of claimants, defendants and issues. Among the cases involving public entities, the primary claims have involved bid protests and challenges to code requirements, whilst private parties have addressed failure to obtain LEED certification, non-satisfaction of LEED standards, additional costs of LEED compliance, and whether and to what extent “green” damages are cognizable and calculable. Clearly representing only the LEEDing edge (sorry, couldn't help myself) of green building litigation, David's presentation offered valuable insight into the depth and breadth of affected parties and the diversity and complexity of legal issues unique to green building.

Following David was a great panel discussion of green building construction contracts by Tom Giordano of [Lend Lease](#), Mike Deane of [Turner Construction](#) and Dave McPherson of [Watt, Tieder Holfar & Fitzgerald](#). This primary focus was on allocation of contractual responsibility and potential liabilities of owners, design professionals and constructors for achieving identified “green” targets, be they LEED certification, energy efficiency, or some other green building performance metric. Issues such as assigning responsibility (often at the “task” level), waivers of consequential damages (both inside and outside of the government contracting context), and allocation of risk of non-performance were discussed, and helpful examples from actual projects presented. Giordano and Deane both emphasized the necessity of a careful (and sometimes surgical) allocation of responsibilities, as well as a cooperative spirit when negotiating these matters. In some respects, the discussion echoed several themes identified in Wednesday's presentation on “Sustainable Building Law” during which Joshua Ballance, Associate Counsel on the [American Institute of Architects' Contract Documents](#) team, provided a helpful overview of the [AIA's Guide for Sustainable Projects](#) (a free download). Rounding out the discussion of transaction and contract issues was Keith Sutherland of [Stewart McKelvey](#), a leading Canadian firm. Stuart covered key “green leasing” issues, with particular attention to Canada's Realpac [Model Green Office Lease](#). This form, which incorporates a separately negotiated “Environmental Management Plan”, provides a useful drafting approach for incorporating green lease requirements.

Next up was Jeff Lesk of [Nixon Peabody's](#) Washington, D.C. office who discussed legal issues in the context of green building financing. This guy is not only on top of his game, he has true passion for this stuff. Realistic about the nature of the challenges facing green building finance, including the glaring lack of standards through which the real property appraisal community might quantify the economic benefits and enhanced asset values of green buildings, Lesk focused instead on the availability of a variety of tax credits (and associated monetization schemes) as the best hope for financing green building projects. Renewable energy tax credits, which in many circumstances can be “bundled” with tax credits for other project attributes (such as affordable housing credits), is often the only way many green projects are realized. It also accounts for the fact that today so much affordable housing is being built to green standards. Jeff’s current Holy Grail is an affordable housing project which utilizes wind-based on-site renewable energy. If you have a project that fits this description and needs additional funding, send it his way!

The next two segments of the program shifted back to risk management – and how various insurance products and construction sureties might be used to help bridge some of the unique risk gaps encountered in green building. Keith McGlamery of [The McGlamery Law Firm, PLLC](#) described some newly available builder’s risk coverage offered by Zurich, Ace and others for green construction projects. These policy forms (which are often negotiable) offer enhanced coverage for losses resulting from construction delays for the acquisition of special equipment or materials, waste recycling, and *loss of tax credits and other financial incentives*. And while no company is insuring that a building will achieve an identified standard or performance level, an AIG affiliate now offers to design professionals “green reputation insurance” which provides limited defense coverage should the architect or engineer be sued if a project fails to achieve a specified standard. Keith then walked through a hypothetical (that would be the envy of many a law school professor) involving hurricane damage to a green roof. Think about the doomsday scenarios that were predicted when Hurricane Irene hit Manhattan and all of the sudden none of this sounds much less “hypothetical”. While expensive, coverage for these kinds of losses is available. However, project owners must now make sure that their underlying policies cover special risks to green buildings, and obtain a separate “difference in conditions” or DIC policy to cover wind damage from a hurricane. Next up was Edward Lee of [Whiteford Taylor Preston](#) to discuss many of the misinformed expectations regarding the role of the construction surety in a green building project. Ed emphasized that a surety company only guarantees performance by the obligated party (contractor). It does not guarantee achievement of any performance or construction standard, such as LEED, and should not be relied upon for this purpose. Harking back to the earlier discussion regarding construction contracts and related risks, he reiterated that a surety’s obligations can rise no further than the contractor’s, again highlighting the importance of clearly allocating in the contract documents responsibility for activities related to LEED or similar certifications. Ed also echoed with some dismay the observations made on several occasions by Chris Cheatham in his [Green Building Law Update regarding the D.C. Green Building Act](#), which still contains a performance bond requirement that simply is not offered in the market. This requirement, which amounts to a “forfeiture bond” (like when someone skips bail), will be effective in less than three months.

Up next was Stephen Del Percio of [Arent Fox](#), blogger extraordinaire and publisher of [The Green Real Estate Law Journal](#), who shared an insightful (and entertaining) analysis of greenwashing issues associated with green buildings. First was the news that we will apparently be waiting much longer for final promulgation of the long awaited and now twice-proposed revisions to [FTC’s Green Guides](#). Steve provided several useful examples of misleading (or potentially misleading) claims regarding the

environmental or sustainability features of green buildings, including claims of LEED registration and certification status. As you may know, it was green building performance claims that were front and center in the recently decided case of [Gifford v. United States Green Building Council](#). And there is little doubt that there will be more where that came from. One very positive outcome of that case (and related media reports) is the extraordinary emphasis now being placed on actual performance of LEED certified buildings. Many of the educational sessions at Greenbuild addressed topics related to green building performance measurement, as well as LEED certification and recertification.

Also making an appearance on behalf of the Canadian green building law community was John Haythorne of [Fraser Milner Casgrain LLP](#). John observed that, mainly as a result of a well-defined public-private partnership finance structure, the certification and performance risks which were discussed at great length by the U.S. based panelists are managed and allocated in a more straightforward manner in Canada. In John's recent experience, much greater emphasis is placed on long-term building lifecycle risk, especially those related to either product or materials failure associated with green building components, not unlike the claims being litigated in [The Chesapeake Bay Foundation, Inc., et al. v. Weyerhaeuser Company](#), which is scheduled to go to trial next month. It was helpful to gain the Canadian perspective. Maybe we could learn a thing or two from our very hospitable friends north of the border, eh?

Rounding out the presentation was Stuart Kaplow of [Stuart Kaplow, P.A.](#) and its consulting affiliate, [Ajhon](#). With due apologies to Letterman, Stuart presented his "Top 10" list of what green building lawyers can and should do to help move the industry forward. In particular, he emphasized the "internationalization" of LEED and stressed the level of opportunity this has created for U.S. based legal professionals. He also suggested that lawyers consider leveraging their talents through non-traditional business vehicles, such as consulting practices, noting that his business has experienced explosive growth by performing services through a "non-legal" affiliate.

So there you have it folks. While green building law has made great strides in the past few years, there is a sense that we are still only at the beginning, and many growing pains are yet to be endured. Green building lawyers are presented with ongoing opportunities to shape and influence the direction of this industry, and perhaps do a little good along the way, a unique advantage not enjoyed by most of our colleagues. I hope to see many more of you at [Greenbuild 2012](#) in San Francisco next November.