

The Greening of the Litigation Landscape—Part 1

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Background

According to the U.S. Green Building Council (USGBC), buildings in the United States account for 36 percent of the country's total energy use. Buildings also account for almost two-thirds of the country's electric consumption; one-third of all greenhouse gas emissions, as well as all raw materials used and waste output; and approximately one-eighth of all potable water consumption. The term "green building" is used to describe a variety of practices that attempt to reduce these numbers by focusing on a building's design, construction, operation or renovation. One commonly cited definition of green building provided by the Office of the Federal Environmental Executive defines green building as "the practice of (1) increasing the efficiency with which buildings and their sites use energy, water, and materials, and (2) reducing building impacts on human health and the environment, through better siting, design, construction, operation, maintenance, and removal—the complete building life cycle."

Cities and towns across the United States have adopted a wide variety of programs and regulations designed to promote the development of green buildings. According

to the USGBC, 172 localities (112 cities, 32 counties and 28 towns) have adopted some type of green building initiative. These initiatives may be either voluntary and incentive-based or mandatory, and they often incorporate various aspects of third-party green building ratings systems such as the Leadership in Energy and Environmental Design (LEED) rating system developed by the USGBC; Green Communities Criteria (Green Communities) developed by Enterprise Community Partners; or Green Globes (Green Globes), which is a project of the Green Buildings Initiative.

Each of these ratings systems assesses the performance of a building in a number of areas that include energy consumption, water use, use of green building materials and indoor environmental quality.

The most widely used third-party green buildings rating system is LEED. LEED rates buildings as Certified, Silver, Gold or Platinum, depending on the total number of points the building receives in six different categories: (1) sustainable site development; (2) water efficiency; (3) energy and atmosphere; (4) materials and resources; (5) indoor environmental quality; and (6) innovation and design process. Each category

contains a menu of options, and each option is assigned a number of points. To obtain the total number of points required for the particular level of certification desired, developers can then select which options they would like to incorporate into their building design.

The first part of this article provides a brief overview of the types of green initiatives that impact private development: *voluntary* programs that often provide incentives for green construction and *mandatory* programs that require compliance. Parts 2 and 3 will discuss the concerns raised here, in Part 1, in more detail, and will include several practical tips to consider before undertaking a retail green construction project.

Liability Issues in Building Green for Retail

The increasing adoption of local green building initiatives has raised concerns that these new initiatives may spawn litigation. New regulations will alter the existing balance of responsibilities and risks among the parties undertaking the construction of a green retail facility or the conversion of an existing retail center to a green retail center. Consequently, there is the potential of litigation between members of the green building development team, which typically includes the property owner/developer; an environmental professional; a group of design professionals (architect, urban planner and landscape architect); the general contractor in collaboration with the insurance providers; and lenders (referred to in this article, broadly, as the “development team”).

There is the concern that the green building initiatives themselves may run afoul of existing state and federal laws. Part 2 will focus on the potential for litigation between members of the development team, and will

discuss how local green initiatives may affect the allocation of responsibilities and risk among the members of a development team. It will use *Shaw Development, LLC v. Southern Builders, Inc.*, often cited as the nation’s first green litigation, as an example of how these green building responsibilities and risks may lead to litigation during the development of a green retail building.

The article will then examine how the American Institute of Architects (AIA) has revised its standard construction contracts in an attempt to improve coordination and communication between the members of the development team during construction of a green project to minimize the risk of litigation. Part 2 will conclude by recommending actions that members of the development team can take to reduce the risk of litigation and ensure that each member has a clear understanding of its role, responsibilities and degree of risk when undertaking a green retail construction project.

The last part of this article focuses on potential legal challenges to local government green initiatives themselves. First, local governments may lack the authority to enact green building initiatives. No state has adopted legislation that specifically authorizes local governments to adopt green building regulations and, without the requisite authority, it is possible that local, voluntary incentive-based green initiatives could be held invalid. Second, local green initiatives that mandate compliance may raise delegation of power and void for vagueness issues because those green initiatives may not only lack specific standards to guide administrative enforcement but also often delegate policy-making and enforcement to private persons. Third, adopting regulations that require private, third-party certification may raise antitrust issues that may give a private organization the sole

authority to review and certify a building's green status. Fourth and finally, green regulations that contain specific prescriptive requirements may be pre-empted by federal law.

Part 3 will conclude with a list of practice tips that members of the development team should consider when reviewing a local green initiative to ensure that the initiative has been properly authorized and complies with constitutional principles and federal laws.

Summary of Local Green Building Initiatives

As discussed above, there are two categories of local green building initiatives that affect private retail development: voluntary incentive-based programs and mandatory compliance programs.

1. Voluntary Incentive-Based Programs

Many communities have adopted incentive-based programs that provide incentives to encourage developers to meet, voluntarily, certain environmentally friendly requirements or to obtain third-party certification: density bonuses, tax credits or rebates, reduced permitting fees and accelerated permit processing. For example, Baltimore County, MD, gives a county property tax credit to any private commercial building that achieves LEED Silver certification; Baltimore County Web site (2009). Bar Harbor, ME, gives developers a density bonus of additional market rate dwelling units for construction projects in which all constructed dwelling units meet LEED standards. Bar Harbor Municipal Code § 125-67(M)(6)(a)[2][d] (2008). Burbank, CA, expedites the permitting process and reduces permit fees based on a building's LEED

certification. Burbank Green Building and Sustainable Architect Reference Manual (March 2004).

2. Mandatory Compliance Programs

Other communities have taken a more aggressive approach to green building by mandating compliance with adopted green building requirements. These mandatory programs consist of (i) criteria-based programs requiring a building to meet certain criteria often created by private third-party organizations, but do not require certification by that private third party, and (ii) prescriptive programs requiring third-party certification that a building or its components meet certain minimum performance thresholds.

Criteria-Based Regulations

These types of regulations require that a developer meet a certain baseline threshold under a private third-party certification system, but they generally do not require third-party certification. These types of programs may also include performance standards developed by the municipality. For example, Boston's newly amended zoning code requires that all new commercial development greater than 50,000 square feet be LEED "certifiable" but does not require LEED certification. The zoning code gives the developer the discretion to determine how to obtain the required number of points by selecting from a variety of green building requirements that include LEED and non-LEED standards developed by the City. Boston Zoning Code § 80, Art. 37. Similarly, the City of Long Beach, CA, requires that all new residential and mixed-use construction that includes 50 or more dwelling units or commercial construction over 50,000 sq. ft. obtain LEED certification

or provide evidence from an independent inspector, indicating that the new construction qualifies for LEED certification.

Prescriptive Programs

Some communities have taken an even more aggressive approach and mandate that buildings obtain third-party certification. San Francisco, CA, for example, has taken this approach and adopted a green building ordinance that requires all new commercial and residential buildings, regardless of size, comply with the city's Green Building performance requirements and obtain LEED certification (certification level required depends on the type and size of the project) or compliance with the GreenPoints Rating system developed by Build It Green, a non-profit organization based on California. The Town of Babylon, NY, and the City of

Cabaras, CA, have taken similar mandatory approaches. The Town of Babylon approved a resolution that specifically adopts the LEED rating system for New Construction 2.2, and automatically adopts any future versions of LEED promulgated by USGBC. (See Town of Babylon Resolution, adopted Nov. 15, 2006.) The resolution requires that new construction greater than 4,000 sq. ft. provide evidence that the new construction shall attain LEED-certified status. Ordinance No. 2003-185 adopted by the City of Calabasas, CA, requires that all new buildings up to 5,000 sq. ft. achieve LEED-certified status and all buildings above 5,000 sq. ft. obtain a LEED Silver rating.

Part 2 will focus on the potential for litigation between members of the development team.

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Greening of the Litigation Landscape – Part 2: Liability Issues in Building Green for Retail

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Part 1 of this article provided a brief overview of the two types of green initiatives that impact private development: voluntary programs that often provide incentives for green construction and mandatory programs that require compliance. Part 2 will focus on the potential for litigation between members of the development team.

Potential Litigation Among Members of the Green Building Development Team

These new local green building requirements impose new standards and procedures on members of a development team, which, in turn, create new responsibilities and risks that must be allocated among development team members. The new responsibilities and the risk raise the fundamental question of how these are to be allocated. For example:

- Who is responsible for satisfying new local procedural requirements?
- Which member of the development team is liable for a failure to meet required mandatory thresholds and/or obtain LEED certification?
- Who is responsible for losses caused by delays due to the unavailability of required materials?

- Who bears the cost of design changes that are necessary to meet local requirements but will increase project expenses?
- What remedies are available to the parties?

Typically, these questions are addressed in contractual documents among the development team members.

Generally, the primary responsibilities and risks are allocated through the use of standardized contractual language and form documents. Unfortunately, many of these existing contracts and forms do not adequately address the new risks, responsibilities and potential disputes that may arise during retail green construction. Therefore, each member of the development team must carefully reassess existing contractual language to minimize the risks that arise in green building construction and avoid possible litigation.

Typical Concerns of Development Team Members

Each member of the development team has specific concerns related to the allocation of responsibilities and risks among the team

members during the development process. Owners, in particular, are concerned with ensuring that the responsibility for problems arising during the design and the construction fall on the general contractor and the architect. As a result, owners often want to include contract language requiring indemnification, express warranties, and guaranties of the work and performance. They are also concerned with construction schedules, procedures for handling project delays, payment provisions, liquidated damages and insurance requirements.

The concerns of the general contractor relate primarily to the scope of the work and to force majeure events. The general contractor is generally responsible for coordinating all aspects of construction including the mechanical, electrical and plumbing work. Because of these responsibilities, the general contractor desires clearly defined roles and responsibilities and team consensus on project plans, schedules and budgets. The general contractor is also aware of the risk of unforeseen events and delays that are outside the general contractor's control. Typically, force majeure clauses specify which events will constitute an excusable delay and entitle the contractor to an extension of time without penalty. The general contractor also wants well-defined procedures for making changes to project plans.

The concerns of architects relate to the potential liability for perceived errors in design, guaranties of performance and methods to approve changes to the building design. If an owner perceives an error in the design of a building, the first question that must be addressed is whether the architect met the required standard of care. The architect's standard of care is set forth in § 1.2 of Document No. B101-2007 entitled Standard Form of Agreement Between Owner and Architect, created by

the AIA (American Institute of Architects). It requires that an architect "perform its services consistently with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances."

In some cases, architects will attempt to obtain contractual protection that prevents an owner from asserting a negligence claim unless the amount of damages resulting from the error exceeds a certain threshold. Architects also are wary of providing guaranties or warranties that their designs will be error-free or meet specific standards. Potential liability for delays in the work resulting from design changes also is of particular concern to architects.

New Legal Issues Raised During the Construction of Green Building Projects

Each team member's specific area of concern raises questions over the proper allocation of responsibility and risk during the green construction process. Many of these areas have been heavily litigated; and a significant body of case law and standard practices has developed, resulting in standardized contract language to address these concerns. Local green building initiatives, however, raise new issues regarding the allocation of responsibility and risk between the members of the development team, which may not be adequately addressed by existing construction contracts and practices. In particular, green building projects raise the following new potential issues:

- Allocation of responsibility for overseeing compliance with new local green building regulations;
- Allocation of risk if the project fails to satisfy local green building regulations

or fails to qualify for a proffered incentive such as a tax credit or density bonus;

- Calculation of damages when a project fails to meet expectations or satisfy local requirements;
- Availability of adequate insurance for architects and contractors undertaking green building construction; and
- Possibility of green building material failure.

As these new issues may not be accounted for in existing contracts and forms, they can result in disputes that may require litigation to resolve.

Responsibility for Compliance

One of the new issues raised by local green building initiatives is determining who is responsible for overseeing compliance with new local regulations, which may require obtaining LEED (Leadership in Energy and Environmental Design) certification. The general contractor is typically responsible for obtaining necessary permits and ensuring that the project complies with local laws; however, the general contractor may lack experience and familiarity with the LEED certification process and/or may not want to assume responsibility for obtaining LEED certification.

Non-Compliance and Failure to Meet Expectations

A second new issue is determining who bears the risk if the project does not meet the newly imposed local green building requirements. Failure to meet local requirements may occur for a number of reasons—deficient design; deficient construction; changes in design; lack of required materials and appropriate substitutions; failure of

materials used; delays due to disputes among development team members; and budget constraints. This issue is of particular importance because failure to meet the local green building requirements may result in significant delays and damages. In some communities, such as Boston, if a project fails to meet new green building requirements, it cannot obtain a Certificate of Occupancy. Failure to obtain a Certificate of Occupancy may result in lost profits and revenues, reputational damage and additional expenses incurred in order to satisfy green building requirements. Additionally, in states and communities that provide financial incentives such as tax credits to encourage green construction, the loss of those incentives could mean the difference between a profitable and an unprofitable project.

Damages for Failure to Satisfy Local Requirements or Expectations

A third new issue is determining what damages will be awarded if a project fails to meet local requirements. Will damages include lost profits or rents, lost tax credits or the diminished value of the property? Will damages include any losses incurred during the time it takes to meet local requirements as well as additional construction costs? How should those damages be calculated?

The issue of damages is complicated by the fact that most construction contracts include a waiver of consequential damages from the property owner. Generally, consequential damages are defined as losses or injuries that do not flow immediately from an act or breach, but from the consequences of that act or breach. To recover consequential damages, the damages must have been reasonably foreseeable when the contract was made. Consequential damages can include lost rent, reputational damages,

interest and finance charges, additional labor costs, and additional energy costs. It is not necessarily clear what constitutes consequential damages and how these damages would be calculated in cases involving green construction. For example, if a developer was relying on obtaining a LEED Platinum designation in order to qualify for a tax abatement, but if the building obtained only a LEED Silver designation, would the lost tax credit constitute consequential damages? Could the developer recover other consequential damages? If so, from whom? And how would those damages be calculated?

Availability of Adequate Insurance and Standard of Care

A fourth issue that is raised by local mandatory green building initiatives is whether contractors and architects will be able to obtain insurance policies or performance bonds that adequately take into consideration the liability risks associated with constructing a green project. In other words, given the new responsibilities and risks that will arise on a green building project, will contractors and architects be able to obtain liability insurance that covers potential losses that could arise during a green building project in an amount sufficient to reassure property owners, developers and lenders that losses will be covered? A recent study by Marsh, a New York City-based insurance broker, found that current insurance products do not address the risks raised by green building construction with respect to liability issues. Source: The Green Built Environment in the United States, 2008 Year-end Update of the State of the Insurance Market (Dec. 2008)

Marsh cautions that green design and construction involve enhanced performance expectations and an evolving standard of

care that may not be covered by the professional liability insurance policies of traditional architects and engineers. In particular, some experts note that the traditional “reasonable architect” standard of care may take on a more nuanced definition in the green building context because determining who should be included in the pool of similar architects becomes more difficult. For example: Do you compare yourself to other LEED Accredited Professionals? Or do you compare yourself only to certain architects with green building experience?

Failure of Green Building Materials

A final new issue focuses on the potential for third-party product or materials failure, which could occur in a number of contexts. One scenario would be when a product that is expected to meet certain performance criteria fails and, as a result, the building fails to receive local approval. A second issue could arise if a product is altered or used in a way that is not intended by manufacturers in order to meet local green building requirements. Another could come about if a product works for a limited period of time and then fails.

The First Green Building Litigation: Shaw Development, LLC v. Southern Builders, Inc.

The case of *Shaw Development, LLC v. Southern Builders, Inc.*, cited by many lawyers and scholars as the nation’s first green building litigation, illustrates many of the potential problems that can arise during a green building project. Although the case involves a state green building program and, at this writing, appears to have been settled out of court, it provides a real-life example of how members of the development team should carefully examine and define their roles and responsibilities when working on a

green building project. Then, the development team should draft the contracts accordingly.

The case involved the development of a luxury condominium complex named the Captain's Galley, in Crisfield, MD, on the Chesapeake Bay, and the failure of the project to obtain state tax credits under the state's green building tax credit program. Maryland has adopted a tax credit program that offers state income tax credits of up to 8 percent of a project's total cost for buildings greater than 20,000 square feet. However, only buildings or rehabilitations of buildings that meet certain criteria, which include qualifying for a LEED Silver rating, can obtain the tax credit. Md. Code Ann., Tax-Gen § 10-722(i)(1) (2008). The program requires that an applicant first submit an Initial Credit Certificate Application to the Maryland Energy Administration (MEA). The MEA reviews the application and, if it is sufficient, the MEA issues an Initial Credit Certificate, which sets the project's maximum credit amount and specifies the expiration date by which the project must receive a Final Credit Certificate. A Final Credit Certificate cannot be issued until the project receives a Certificate of Occupancy and a LEED Accredited Professional submits an Eligibility Certificate to the MEA stating that the project meets the criteria necessary to obtain the tax credit. However, if the Final Credit Certificate is not issued before the Initial Credit Certificate expires, the tax credits are placed back into the pool and the applicant must re-apply for the credits.

In 2006, the plaintiff, Southern Builders, Inc. (Southern Builders), the general contractor for the project, filed a \$54,000 mechanics lien against the project owner, Shaw Development, LLC (Shaw). Shaw filed a counterclaim against Southern

Builders that sought, among other things, \$635,000 in what it claimed were lost tax credits under the state's green building tax credit program for the contractor's failure to construct "an environmentally sound 'Green Building,' with a Silver Certification level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Rating System," as was specifically set forth in the Project Manual and Project Specifications. Counter-Complaint, p. 4, *Southern Builders, Inc. v. Shaw Development, LLC*, No. 19-C-07-011405.

Interestingly, Shaw's counterclaim does not specifically state how Southern Builders was responsible for the lost tax credits. Presumably, it was because of Southern Builders' failure to obtain a Certificate of Occupancy before the Initial Credit Certificate expired. The Counter Complaint states that the project was still incomplete, nine months after the completion date specified in the AIA contract for the project. In fact, it is unclear whether there would have been any litigation if the building had been completed on time and followed the designs provided by the architect.

More interesting is what is omitted from the project's contract documents. None of the project's contract documents states who had responsibility for obtaining the Final Credit Certificate from the MEA. Additionally, there is no discussion of who is responsible for ensuring that the project complied with the designs provided and who bore the risk if the project did not qualify for the LEED Silver rating required to obtain the tax credits. Exhibit B of the Counter Complaint merely states that the

Work consists of the following: ... Project is designed to comply with a Silver Certification Level according to the U.S.

Green Building Council’s Leadership in Energy and Environmental Design (LEED) Rating System as specified in Division 1 Section ‘LEED Requirements.’

This language does not seem conclusive as to Southern Builders’ liability, as Shaw argued. The contract documents do not state that Southern Builders would be responsible for ensuring that the project would be built as designed, nor does it guarantee that the project will qualify for a LEED Silver Rating. It merely states that the project is “designed” to comply with the LEED Silver rating requirements. As a result, the contractual documents in this case do not appear to have considered the risk if the project, for whatever reason, failed to obtain the tax credits.

AIA Contracts Revised to Incorporate Green Building Provisions

The potential for litigation such as the Shaw Development case that can arise as a result of local green building initiatives led the AIA to revise its standard forms in 2007 to better allocate the responsibilities among the members of the development team and reduce the risk of litigation. As a result of its work, the AIA has released two new forms: B101 (2007) (Standard Form Agreement Between Owner and Architect) and B214 (2007) (Standard Form of Architect’s Services: LEED Certification).

The B101 is meant to replace existing commonly used forms, the AIA B141 (1997) and B151 (1997), which previously did not include any terms specific to green construction. The B101 incorporates both green building and LEED concepts. Section 3.2.3 of the new form now states that the architect:

...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.

Section 3.2.5.1 of the B101 states 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.

Finally, if the owner requests extensive design alternatives such as energy modeling, unique systems design, in-depth materials research or LEED certification, the architect will provide those services but as “Additional Services” at an additional cost. AIA, Form B101 (2007) [hereinafter Form B101] §§ 4.1, 4.1.23 and 4.1.24.

Section 4.1.24 also requires that the owner and architect specify which party is responsible for the LEED certification. If LEED certification is desired, the architect and owner must also complete and execute the new AIA form, B214 (2007), which places primary responsibility for completing LEED certification on the architect. Under the B214, the architect is responsible for drafting the certification documents, presenting them to the owner for approval, overseeing construction and completing the LEED certification process. Section 2.4.1 requires the architect to “prepare a LEED Certification Plan based on the LEED points targeted”

Section 2.5.1 states that “[t]he Architect shall organize and manage the LEED design documentation and certification process,” which includes, under § 2.5.6, preparing a LEED Certification Application for the Project and presenting the Application to the USGBC in accordance with the LEED Certification Plan.

Sections 2.6, 2.8.1 and 2.8.3 of the B214 also hold the architect responsible for specifying the contractor’s responsibilities and documentation requirements related to LEED certification, providing necessary information to the contractor and keeping the owner informed of progress on the LEED certification process. Sections 2.8.6 and 2.8.7 require the architect to review proposed project changes and recommend to the owner whether the change should be approved or denied.

Section 4.1 of the B214 imposes certain responsibilities on the owner. The owner must prepare a program specifying the owner’s “objectives, schedule, constraints and criteria, including system requirements and relationships, special equipment and site requirements.” The owner must give information to the architect so that the architect can complete the LEED certification process. Section 4.4 states that the owner must “furnish services of design consultants, testing agencies, and contractors necessary to allow the Architect to provide the LEED Certification Services.”

The AIA appears to have taken the position that it is the architect’s responsibility to design, oversee and coordinate the LEED certification process on a green building project. No similar increased responsibilities were imposed on contractors under changes to the A101 (2007) (Standard Form between Owner and Contractor when the basis of payment is a Stipulated Sum). In fact, the revised A101 does not appear to

include any discussion of green buildings or green building requirements. As a result, the new AIA forms arguably increase the architect’s risk for breach of contract and negligence claims if the owner or contractor perceives that an architect’s action or failure to act has resulted in damage. However, the AIA only recently introduced the new forms; as of yet, it is unclear whether they will be widely used. Our experience to date suggests that development teams have not yet embraced the new forms and continue to use the older B141 and B151 forms.

It is important to note that the new forms do not contain performance guaranties; nor do they discuss the relative liability of the members of the development team if the project fails to meet the requirements of locally imposed green building initiatives. Therefore, if a building fails to meet local green building requirements, tricky issues of liability must still be sorted out among the development team members.

Practice Tips

Because liability issues are likely to remain unresolved in the foreseeable future, members of a development team should consider the following tips to help clarify responsibilities and minimize disputes:

- ***Be wary of guarantees and over-promising.*** Developers should carefully review marketing materials and be wary of architects and contractors who make excessive representations about their ability to deliver services or guarantee outcomes. In their contracts, developers may want to consider including language indicating they have materially relied on the marketing materials of a contractor or architect; then, they have the option to bring a claim seeking damages for detrimental reliance if the

contractors or architects fail to perform as promised. To avoid liability for this kind of claim, contractors and architects should also carefully review their marketing materials and remove language that may appear to be a guaranty of performance.

- ***Goals and expectations should be clearly defined early in the process.*** Owners, architects and consultants should work together to create specific project goals and carefully draft the contract language to memorialize those goals. Is LEED certification a project goal? If so, what is the level of certification? If LEED certification is not the goal, what standards must be met? Are there locally defined performance specifications that must be met for the building or its systems? Are there specific installations that the owner wants incorporated—such as a solar roof or cork floorings? There should be several rounds of discussion between the parties so that each has a clear understanding of the project goals and associated expectations.
- ***Carefully review forms and contract language.*** Form contracts, especially older forms, may not be sufficiently detailed to address the new risks that may arise during green retail construction. Each member of the development team should carefully review its contract to ensure that the contract clearly defines its role, responsibilities and risks during the construction process.
- ***Include specific language.*** Development team members should consider including specific contractual language regarding damages and liability, particularly if the project involves third-party incentives such as tax credits.

Architects and contractors should be sure that their contracts specify the standard of care that can be reasonably expected in their performance. The more specific the language used, the less likelihood of disputes as the project progresses.

- ***Be aware of and informed about local rules and regulations.*** It is important that the development team include members who have a solid understanding of the local rules and regulations governing green construction. Do the local regulations use LEED or some other green building rating system? Do the local regulations require third-party certification? Does the local program use the most current version of LEED, or does it use a previous version? Has the local government developed its own green building requirements? Are there local or state incentive programs for which the project may qualify? What steps must be taken to ensure compliance with local green building regulations? If the local regulations allow the use of an equivalent rating system, what systems are considered equivalent? If allowed, project teams should evaluate all possible green building rating systems, as some ratings systems may be less expensive and more procedurally burdensome than others.
- ***Be aware of the project's status, and be prepared to be flexible.*** Because local green building initiatives are relatively new and many architects, contractors, property owners and municipal governments are still grappling with the process and requirements, there may be complications due to delays, budget adjustments and regulatory gridlock in

the course of the project. Changes to one aspect of the project often impact other aspects and will need to be reviewed and approved by several parties to ensure that the change does not affect compliance with local requirements. The LEED certification program will involve additional expenses and may

require additional time. An awareness of the project's status and an acceptance of the potential complications and delays will help to minimize disputes.

The last part of this article, Part 3, will focus on potential legal challenges to local government green initiatives themselves.

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