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LEGAL IMPLICATIONS OF LEED

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Greensfelder, Hemker & Gale, P.C.
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TODAY'S OUTLINE

- LEED v3 (2009)
- LEED Accreditation
- The Legal Implications of building to Green or LEED Standards
 - Green building legislation (required by)
 - Federal government
 - State government
 - Local governments
 - Incentives available
 - Federal government
 - State government
 - Local governments / other third parties (e.g., utility programs etc)
- Legal Claims: Implications & Risks
- Risk Mitigation
- Q & A

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LEED STATISTICS

Square Footage of Commercial LEED Certified Projects (cumulative, in millions)

613*
million

* As of September 2009

Year	Square Footage (in millions)
2005	~10
2006	~20
2007	~40
2008	~50
2009	~613

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LEED STATISTICS

Commercial LEED Registered Projects (per year)

25,811* Total Currently Registered

***8,968**

* As of September 2009

Year	Registered Projects (per year)
2005	~1,000
2006	~1,500
2007	~3,000
2008	~5,000
2009	8,968

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LEED STATISTICS

Commercial LEED Certified Projects (cumulative)

3,855*

* As of September 2009

Year	Cumulative Projects
2005	~100
2006	~200
2007	~400
2008	~1,000
2009	3,855

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LEED STATISTICS

- **Missouri:**
 - 44+ LEED certified buildings
 - 60% + located in St. Louis County (Aug. 2009)
 - 220+ registered projects seeking LEED certification (Aug. 2009)
- **Illinois:**
 - 160+ LEED certified buildings (Aug. 2009)
 - 708+ registered projects seeking LEED certification (Aug. 2009)

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LEED v3 (2009)

- **LEED v3 (2009) was launched April 27, 2009:**
 - Updates and aligns existing rating systems – pool of prerequisites/credits totaling 100 points
 - Predictable development cycle for new versions
 - More accurate credit point impact on environmental and human health
 - Regional points: Additional points for actions considered most important in defined regions
 - The certification process (LEED APs)

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LEED 2009 (v3)

USGBC has four levels of LEED:

Certified 40 Silver 50 Gold 60 Platinum 80

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LEED 2009 (v3)

	Prereq's	Points
Sustainable Site	1	26
Water Efficiency	1	10
Energy & Atmosphere	3	35
Materials & Resources	1	14
Indoor Environmental Quality	2	15
		100
Innovative Design		6
Regional Credits		4

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LEED 2009 (v3) – REGIONAL CREDITS

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RPCs for 63102

- **SS c 1:** Site selection
- **SS c 5.1:** Site development: protect/restore habitat
- **SS c 6.2:** Storm water design: quality
- **EA c 2 (7%):** On-site renewable energy
- **MR c 2 (75%):** On-site waste management
- **MR c 5 (20%):** Regional materials

For state-by-state listing of RPCs:
www.usgbc.org/LEED2009

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LEED AP ACCREDITATION

130,000 building professionals across all areas of practice have become LEED credentialed professionals.

GREEN BUILDING®
CERTIFICATION INSTITUTE

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LEED AP ACCREDITATION

- **LEED Professional Accreditation**
 - LEED Green Associate
 - LEED AP + (track)
 - LEED Fellow

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LEED AP ACCREDITATION

- **LEED Green Associate**
 - Agree to Disciplinary and Exam Appeals Policy and Credentialing Maintenance Program
 - Have **experience** in the form of
 - EITHER documented [involvement in support of a LEED-registered project](#)
 - OR employment (or previous employment) in a [sustainable field of work](#)
 - OR engagement in (or completion of) an education program that addresses green building principles
 - Submit to an application audit




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LEED AP ACCREDITATION

- **LEED AP+ Track**
 - Agree to Disciplinary and Exam Appeals Policy and Credentialing Maintenance Program
 - Document [professional experience on a LEED-registered project](#), within the last 3 years, with verification through LEED Online or employer attestation.
 - Submit to application audit.



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LEED AP ACCREDITATION

- **LEED AP Fellow**
 - Under Development
 - Years of experience
 - Contributions to the standards of practice and body of knowledge in the green building field

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LEGAL IMPLICATIONS OF BUILDING TO GREEN OR LEED STANDARDS

- **Building to Green or LEED standards may be required by:**
 - Federal legislation
 - State legislation
 - Local legislation (e.g., local ordinances)
 - Other (e.g., contractual relationships)

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Federal Legislation

- **Building to Green or LEED standards may be required by:**
 - National Environmental Policy Act (NEPA) (passed in 1970)
 - Resource Conservation and Recovery Act (RCRA) (passed in 1976)
 - Clean Air Act (CAA) (passed in 1970)
 - Clean Water Act (The Federal Water Pollution Control Act) (passed in 1972)
 - Brownfields and the Small Business Liability Relief and Brownfields Revitalization Act (the "Brownfields Law") (passed in 1995)
 - CERCLA (The Comprehensive Environmental Response, Compensation and Liability Act of 1980)
 - Energy Policy Act of 2006

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State / Local Legislation

- **Building to Green or LEED standards may be required by:**
 - **State Legislation:**
 - Missouri
 - Illinois
 - **Local Legislation:**
 - City of Clayton, Missouri
 - City of St. Louis, Missouri
 - Kansas City, Missouri
 - **Other states:**
 - Seattle, WA; Portland, OR; San Mateo, CA; Minneapolis, MN; Cook County, IL; Michigan; New York; Maryland.

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LEGAL IMPLICATIONS OF BUILDING TO GREEN OR LEED STANDARDS – CONT'ED

- **Building to Green or LEED standards may be desired because:**

PERCEIVED BUSINESS BENEFITS TO GREEN

- 8-9%* operating cost decreases
- 7.5%* building value increases
- 6.6%* return on investment improves
- 3.5%* occupancy ratio increases
- 3%** rent ratio increases

* Source: McGraw-Hill Construction, "Key Trends in the Construction and C.I. Construction Markets/Market Report", 2008
** Source: McGraw-Hill Construction, "Company of Green Building & Design Report", 2007

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LEGAL IMPLICATIONS OF BUILDING TO GREEN OR LEED STANDARDS – CONT'ED

Green Buildings Can Reduce...

* Tomko, C. & Farnell, W. (2008). Energy performance of LEED for New Construction buildings. Final Report.
** Fazio, C. (2007). The Green Building Institute's Green Building & Design: Corporate Sustainability Report, 2007.
*** GBC Public Building Services (2008). Assessing green building performance & best occupancy strategies of LEED buildings.

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LEGAL IMPLICATIONS OF BUILDING TO GREEN OR LEED STANDARDS – CONT'ED

- **Building to Green or LEED standards may be desired because of the financial incentives available:**
 - **American Recovery and Reinvestment Act of 2009 (a/k/a Stimulus Bill)**
 - \$30B procurement opportunities
 - \$12.75B green building / green contracting
 - \$61B renewable energy and efficiency
 - \$11B modernization of electric grid
 - \$6.3B for state & local governments to make investments in energy efficiency
 - \$80B Transportation, water, infrastructure
 - \$6.8B environmental remediation
 - \$13.4B water resources / infrastructure
 - \$51.2B transportation

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LEGAL IMPLICATIONS OF BUILDING TO GREEN OR LEED STANDARDS

- **Building to Green or LEED standards may be desired because of the (financial) incentives available, which include:**
 - **Federal level:**
 - Tax credits, deductions, exemptions and accelerated depreciation schedules for various qualified technologies
 - Corporate or individuals
 - Instead of federal tax credits, take payments in lieu thereof under the Stimulus Bill
 - **Missouri:**
 - Corporate Tax Credit: Wood Energy Production Credit
 - Personal Deduction: for Home Energy Efficiency Improvements
 - Sales Tax Exemption: State Tax Holiday for Energy-Efficient Appliances
 - State Loan and Energy Loan Programs: Energy Loan Program
 - Utility Rebate Programs
 - Alternative Fuel and Vehicle Incentives

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Future of Green & LEED Legislation?

PREDICTIONS IN GROWTH OF GREEN

- Commercial:** By 2010, approximately 10% (~\$23 billion) of construction starts*
- Corporate America:** By 2009, 80% of corporate America expected to be engaged in green at least 16% of the time; 20% engaged 60% of the time**
- Institutional:** Dedication to green health care and educational facilities expected to increase dramatically over the next five years**

Source:
* McGraw-Hill Construction, Green Building Construction Report, 2009.
** Building Intelligence, Overview of Corporate America Green/Market Report, 2007.
*** McGraw-Hill Construction, Green Building Construction/Market Report, 2007 and Health Care Green Building Construction Report, 2007.

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Implications & Risks

- The Potential Liabilities And Risks On Green Projects Are Not Unique
- Interest In Green Projects Often Comes With Unreasonable Expectations And Inexperienced Participants
- Diligence And Knowledge Are Crucial To Managing Risks

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Implications & Risks

- **All Participants In Green Construction Projects Have Potential Liabilities**
 - Design Professionals
 - Contractors and Subcontractors
 - Owners
 - Construction Managers
 - Bonding and Insurance Providers
 - Consultants – LEED AP
 - Material Suppliers

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Implications & Risks

Southern Builders, Inc. v. Shaw Development, LLC

- Contract was AIA A101
- Contractor being sued for lost tax incentive of \$635,000 available in Maryland for silver-rated LEED® building
- Based on following language contained in “Summary” section of “Project Manual” attached to form agreement:
 - “Project is designed to comply with a Silver Certification Level according to the [USGBC’s LEED® Rating System], as specified in Division 1, Section ‘LEED Requirements’.”

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Design Professional Potential Liabilities

- **Negligence – Breach of Standard of Care**
- **Standard Of Care – Degree Of Care And Skill Ordinarily Exercised By Members Of The Profession Under Same Or Similar Circumstances**
- **Minimum Level Of Performance**
- **Query: What Is The Standard Of Care For Green Design?**

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Design Professional Potential Liabilities

- **In Marketing Materials, Proposals And Contracts, Avoid Words Like:**
 - Certifies
 - Warrants
 - The design will achieve
 - Provide the highest quality
 - Will use best efforts

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Design Professional Potential Liabilities

- **LEED Documentation Forms May Contain Words “declare”, “affirm” or “certify”**
- **May Imply A Warranty Or Guarantee Of Performance**
- **One commentator suggests following contract language:**

The signing of the declaration/affirmation is for the purposes of LEED Certification only and is considered an owner/client service benefit and as used herein the words certify, affirm and declare shall mean an expression of the consultant’s professional opinion to the best of its information, knowledge and belief and does not constitute a warranty or guarantee by the consultant.

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Design Professional Potential Liabilities

- **Not All LEED Points Are Appropriate For All Projects**
- **Design Professional Must Exercise Judgment**
- **Use Of Untested Designs Or New Products May Require Full Disclosure Of Risks To Owner – i.e., Informed Consent**

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Green Contracts- The Early Years

- In earliest contracts incorporating Green Building/LEED rating objectives, contractual requirements not as detailed
 - Subject treated most heavily in requests for proposals and specifications
 - Some reference to the requirements set forth in general conditions
 - Some cost elements specifically identified, but not always
 - Little discussion of document management and procedures to be followed in order to obtain (or facilitate obtaining) LEED rating
 - Little identified in terms of penalties for non-compliance

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Contracting Considerations

- **Many construction contracts begin with form documents (AIA, AGC, and others), and are then modified for each project.**
- **Green Projects Also Require Modification.**
- **Few Form Contract Documents Address Sustainability/Green Construction**
 - AIA Has Addressed Sustainability Generally In The New Owner/Architect Agreement B101-2007
 - AIA Also Has Specific Contract Form For LEED Services B214-2007

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Form Contracts

- **AIA Has Addressed Sustainability Generally In The New Owner/Architect Agreement B101-2007**
- **AIA Also Has Specific Contract Form For LEED Services B214-2007**

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AIA B101 - 2007

- **§3.2.3 – Architect shall discuss with the Owner alternative approaches to design and construction, including the feasibility of incorporating environmentally responsible design approaches**

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AIA B101 - 2007

- **§3.2.5.1 – 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.**

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B214 - 2007

- Provides Architect's Scope Of Services For Project LEED Certification
- Can Be Incorporated Into Owner/Architect Agreement As Sole Scope of Services Or In Addition To Other Services, Or As Modification To Existing Agreement
- Establishes Duties And Obligations For Architect And Owner

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B214 - 2007

- Architect's Duties Include:
 - PreDesign Workshop with Owner, Owner's Consultants and Architect's Consultants to review rating system, examine each LEED credit using Checklist to establish green building goals, identify potential LEED points, examine strategies for implementation, assess impact on the Owner's program and budget, and determine LEED points to be targeted.
 - Prepare LEED Certification Plan based on targeted points.
 - Submit LEED Certification documentation to USGBC – register project, prepare Credit Ruling, prepare Certification Application including supporting documentation required for specific points.
 - Provide specification incorporating LEED requirements. Define Contractor's responsibilities and documentation requirements.

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B214 - 2007

- Conduct Pre-Bid Meeting, Answer Bid Questions, Consider Requests For Substitutions and Assist in Bid Evaluations
- Contract Administration – Review and answer RFI's, visit jobsite, review and approve Contractor submittals, review Change Order requests
- Prepare Final LEED Certification Report

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Contracting Considerations

- Project Delivery Method Is A Key Consideration
 - Traditional: Design/Bid/Build
 - Design/Build
- Contractor's Potential Liability/Risk Increases By Unintended Acceptance of Design Responsibilities

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Contracting Considerations

- Consensus Doc – Green Building Addendum (GBA)
 - Draft Document- Not Final
 - Intended to be used by all project participants
 - Owner
 - Design Team
 - Construction Team
 - Consultants
 - Purpose- set forth roles, responsibilities and procedures and provide for appropriate modifications to governing contracts and affiliated contracts

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Contracting Considerations

- Design Build Institute of America
 - Project Goals
 - Project Commissioning
 - Legal Requirements
 - Remedies
 - Experimental Products, Design or Systems
 - Miscellaneous

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Claim Examples

- Narratives Of Green-Based Claims Against Design Professionals From AIA-Commended Insurance.
- (From Presentation By Frank Musica, Esq. At 2007 AIA National Convention, Located On AIA Website, www.aia.org/siteobjects/files/conted_TH0507)

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LEED® Certification as Guarantee

- Architect agrees to design to acquire enough points for Gold certification. Developer advertises planned office building using superlatives about “reduced operating costs and healthier and more productive occupants” from USGBC information to attract tenants at higher rents. Budget and time constraints prevent certification as Gold. Developer sues for negligence, breach of contract and breach of warranty based on architect’s “guarantee” of Gold certification.

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Operable Sash Endangering Health

- University agreed to architect’s design of operable sash for library despite concerns over effect of untreated air on building’s operations. Architect stressed importance of outside air for health and alertness of students. Solar shading for energy conservation provides shelter for pigeons. Students report respiratory illness when using library. Newspapers report “epidemic”. Parents express concern. Architect sued for negligence because of introduction of diseases contained in pigeon droppings.

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Legal Implications of LEED

- Questions?

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TRANSFORMING THE BUILT ENVIRONMENT

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More details to follow.



ST. LOUIS REGIONAL CHAPTER

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