



Litigation Arising out of LEED Issues

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Litigation Arising out of LEED Issues

- LEEDigation?
- A few LEED cases in the US
- Strategies to avoid becoming a case study
- Why the focus on green?



LEEDigation? Where is it?

- Increase in LEED building applications
- Predicted increase in LEED related litigation
- Patterns emerging in the US



Types of LEED related damages

- Failure to meet LEED standard could result in:
 - Loss of tax preferences
 - Higher operating costs
 - Stigma



Potential Defendants

- Architect /Designer
- Builder
- Equipment Manufacturer
- Construction Certifiers
- Municipalities
- LEED Certifying body?



Possible Claims

- Failure to achieve LEED certification and resulting damages
- LEED certification not delivered after credits sold or in accordance with regulatory timelines and potential negligence/breach of contract
- Foreseeable design flaws with green roofing, solar panels and the collection of rainwater runoff and potential issues with structural integrity and leaking containment systems
- Obligations for maintenance and obtaining replacement parts for solar panels; wind turbines; geo-thermal power and potential delay and increased costs
- Green claims against trade contractor and availability of professional E&O coverage?
- Sealed envelope for efficiency reasons creates indoor air quality issues and a “sick building”
- Grey water recycling leads to “splash back” and potential spread of bacteria



Shaw Development v Southern Builders

- Claim for \$635,000 in damages because project did not obtain LEED certification necessary for tax credits



Destiny USA

- Claim by IRS for loss of tax favourable status and \$2.3M penalty for failure by developer to meet its LEED related promises
- Promises included:
 - 45 megawatt “biofuel” generating plant – largest in the US (>1/3 total US biodiesel supply)
 - 290,000 sq ft of solar panels (6 football fields)
 - 7 megawatts generated by fuel cells
 - LEED certification



Northland Pines High School, Wisconsin

- Citizens filed a LEED certification challenge against Gold-Certified High School
- Certification system allows challenges
- Owners must respond
- USGBC could de-certify
- Canadian equivalent is the Canada Green Building Council



ACHRI v Albuquerque

- Industry led challenge that building code measures outside jurisdiction
- Challenge successful in part
- One of many similar cases



BIA Washington v Washington State Building Council

- BIA sought injunction to prevent new Energy Code coming into effect claiming lack of jurisdiction
- Municipal requirements, building codes, regulations and even legislation could be open to such challenges



Gifford Action

- Gifford Fuel Services commenced class action against USGBC claiming:
 - LEED system fundamentally flawed
 - Based on indefensible point system
 - Misleading system
- Class action abandoned early 2011
- Now a claim by four businesses



Durable Building Credit

- Where did this start?
 - Response to several “leaky/mouldy condo” class action lawsuits where the issue was a lack of building code requirements relating to durability of above grade building envelopes



Durable Building Credit

- Who is liable?
 - Case law suggests that liability in such situations may flow to individual designers, architects, construction contractors and subcontractors, but is NOT going to flow to government regulators (building code developers, development authorities, building inspectors, etc.) and agencies (e.g. CMHC) who have studied the problem but have not regulated in respect of it
 - See for example: *Kimpton v. Canada* 2002 BCSC 1645 (CanLII), (2002), 9 B.C.L.R. (4th) 139 (S.C.), aff'd 2004 BCCA 72 (CanLII) (dismissing claim against Province for not including in the building code, development authority, building inspectors, etc.), *Strata Plan VR 2275 v. Davidson*, 2008 BCSC 77 (dismisses Architect third party claim against CMHC)



Durable Building Credit

- 2004 LEED® Materials and Resource credit 8 for Durable Buildings introduced
 - Requires the design team to develop and implement a durability plan based on CSA “Guidelines on Durability in Buildings” (R2001)
 - Requires review of design details by a qualified “building scientist” AND requires field review by qualified building scientist and contractor



Durable Building Credit

- Liability Issues—in first few year, some insurers were denying coverage of designers/contractors signing the declaration
 - I, declare that we have developed and implemented a Building Durability Plan in accordance with the principles in *CSA S478-95 (R2001) -Guideline on Durability in Buildings*, for the components within the scope of the Guideline, for the construction and pre-occupancy phases of the building as follows:
 - Designed and constructed the building to ensure that the predicted service life exceeds the design service life established in *Table 2 in CSA SA78-95 (R2001) -Guidelines for Durability in Buildings*. Where a component or assembly DSL is shorter than the DSL of the building they have been designed to be readily replaced in accordance with *Table 3*.



Durable Building Credit

- Has the clarification of MRc8 and change to the declaration addressed the liability situation for designers and qualified building scientists?
 - Not fully, general professional negligence liability will always remain where there is a building envelope that fails to achieve the performance agreed to (whether MRc8, BCode, etc.) and all of the parties involved in the design, construction and operation could share in the liability
 - This does not address the issue of any future consequences/implications should building envelope issues result in failure to maintain LEED® certification



How to avoid becoming the next LEED Litigant

- Understand that the risks are not always in your control
- Define what you can by performance or 3rd party verified standard
- Define roles and responsibilities in terms of green building objectives (including timelines and on-going or completed responsibilities)
- Promise only what you can deliver
- Make clear promises
- Put systems in place to ensure delivery
- Control expectations
- Build in consequences for failure to achieve green objectives (including damage to reputations)



LEEDigation?

- Expected wave has not happened
- But patterns of litigation have emerged
- Litigation risk remains
- Lessons can be learned and due diligence implemented



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