



Legal Aspects of Going Green

Presented by Maureen D. Smith and Connie Boyles Lane

Orr&Reno

Attorneys at Law

Attorneys at Law

Overview and Introduction



- What is “Going Green?”
- Legal Challenges
- The 4 “C’s” for minimizing legal risk
- Case Study (green development project)

Going Green: Building Design

- Reduce pollution
- Reuse/conserve resources
- Conserve energy
- Protect ecological balance
- Reduce consumption and waste



Going Green: Building Construction & Renovation

- Energy, Economics & Environmentalism Collide
- Bottom Line:
 - Cost Reduction
 - Improve Performance
 - Increase Productivity
 - Business Reputation/Marketing

Top Legal Challenges

- Understanding Green Building Laws/Energy Codes & Certification Requirements
- Understanding Green Certification Contracting
- Design/Construction Risks
- Risk Allocation/Litigation

Top Legal Challenges – (Continued)

- Regulatory Compliance
- Landlord/Tenant Issues
- Marketing Risks
- Tax and Governmental Incentives

MINIMIZING LEGAL RISK – THE 4 C'S

1. **C**ONSULT

- Assemble Your **Green** Team

2. **C**OMMUNICATE

- Meet and talk regularly

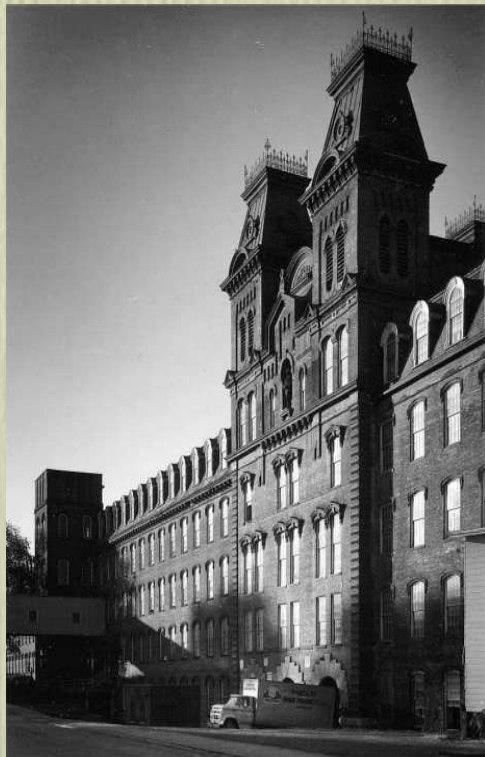
3. **C**ONTRACT

- Allocate Responsibility

4. **C**OMPLY

- Early Legal Review

Case Study – LEED New Construction/Major Renovation



- Owner of office building wishes to make building more attractive to existing and new tenants
- One part = renovations designed to increase energy efficiency
- Other part of project = new LEED certified addition w/green roof
- No LEED consultant

Case Study (Continued)

- Standard Form AIA Document A-141 – Design Builder/Owner Contract
- Owner added LEED guarantee to contract
- Builder added waiver of subrogation
- Financing contingent on Commercial Building Tax Deduction (§179 D) under Energy Policy Act
- Local zoning approval process delayed by LEED/ordinance inconsistencies.

Case Study (Continued)

- Change orders reduced energy efficiency available LEED points for addition and tax deduction.
- Certification denied
- Green roof leaked requiring roof replacement
- Design/Builder insurance coverage denied
- Material used with roof negated warranty

Case Study (Continued)

- Some tenants have cancelled their leases and others are threatening to do so.
- The bank has asked for a meeting and refused to provide the final advance until LEED certification is obtained.
- Builder has filed claim under contract
- Owner sued builder for loss of certification and leaking roof – who cross-claims against manufacturer

Case Study (Continued)

- US EPA has proposed a fine against owner for noncompliance with federal storm water/historic resources.
- OSHA & NHDES actions against owner (builder improperly removed and disposed of asbestos in existing building)
- Local media has done a story about the delays and owner's inability to deliver a green building, affecting reputation during the critical lease negotiations and hearings on next project

MINIMIZING LEGAL RISK – THE 4 C'S

1. CONSULT

- Assemble Your **Green** Team

2. COMMUNICATE

- Meet and talk regularly

3. CONTRACT

- Allocate Responsibility

4. COMPLY

- Early Legal Review

Why is “green” different from “standard” construction/renovation?

- “Green” is an evolving concept that has not been tested in the courts and changes daily
- Laws, regulations, industry standards, “form” contracts and insurance lag behind the “green” movement
- LEED Consultants, Third party “certification”
- Contracts must include green goal in design & contract specifications
- Business tax incentives and grant availability

How NOT Different from Standard Construction Project

- Implementing “best practices”
- Early planning/legal review
- Creation/coordination of team
- Contracts and leases must be specific
- Financing/insurance

Consultation

- Identify Goals
- Build your **green** team early
- Regulatory/Legal Review



IDENTIFY GOALS

- Green certification or simply improve efficiency?
- Cost/benefit analysis with your team
 - Potential construction cost and consultation premium
 - Decreased operating costs
 - Increased health/productivity
 - Unquantifiable benefits: marketing and demand
 - Time Frame
 - Payback Period

LEED

- US Green Building Council:
www.usgbc.org
- LEED promotes a whole-building approach to sustainability by recognizing performance in 5 key areas of human and environmental health
- Most Popular

Five LEED Categories

1. Energy & Atmosphere
2. Sustainable site development
3. Water efficiency
4. Materials selection
5. Indoor environmental quality
 - Innovation in Design
 - Regional Credits

LEED

- Point System
- Levels: Certified, Silver, Gold, Platinum
- Tied to type of development: New construction, existing buildings, core & shell, healthcare, homes, neighborhood
- Certified by third party (USGBC Institute)

Other Certification Programs

- Energy Star (EPA/DOE)
- Green Globes U.S.
- National Association of Homebuilders
- Building for Environmental & Economic Stability (BEES)
- International Organization for Standardization (ISO)
- Specialized buildings (Green Restaurant Ass'n, Green Seal (hotels), Green Guide for Healthcare).

Build Qualified Green Team

- Engineers (mechanical & electrical)
- Architect
- Contractor/Builder
- Historic Preservationist
- Environmental Consultant
- Lawyer
- LEED Consultant
- Others?

Green Development Consultation

- Renovation may require environmental investigation and planning
- Green certifications involve meeting and maintaining specific standards
- Funding and tax considerations

Case Study: early consultation may have identified

- Whether LEED Certification is necessary
- LEED Certification clash with local zoning
- Need for Federal storm water permit
- Built regulatory process into project timeline
- Anticipated redesign to meet LEED minimum program requirements
- Insurance coverage and subrogation issues

Case Study: early consultation may have identified (continued)

- Need for unique contract provisions
- Minimum energy efficiency requirements for certification/tax deductions
- Material warranties
- LEED Design requirements

COMMUNICATE/COORDINATE

- Consult on options within budget
- Agree to performance goals and project specifications
- Assign responsibility for approvals/permits
- Negotiate a single green standard with lenders and other project partners, including tenants
- Practice Tip: Meet EARLY and often with your team and communicate on changes to legal counsel



CONTRACTS – Legal Review

- Legal Review of All Contracts
 - Allocate responsibility
 - Indemnities/insurance
 - Allocation of Liability for Failures
 - Clear Performance Standard
 - Clear Design Standard (“consistent with applicable standard of care”)
 - Define Damages



CONTRACTS – Legal Review

- Who is responsible for documentation
- Who is agent for owner
- Who files/appeals



CONTRACTS – Legal Review

- Insurance must address specific **green** issues – standard language often not adequate
- Make certain policy exclusions do not conflict with need for “certification by” architect



CONTRACTS – Legal Review

- Leases
- Agreement on “**Green**” standard
- How to maintain it over the life of the lease?
- Allocate responsibility between L and T
- What about other tenants?

CASE STUDY: CONTRACTS

- Use of standard forms did not work – contractors, leases, insurance policies
- Standard Form AIA Design/Build vs. 2004 AIA B214 (LEED process)
- ConsensusDOCS contracts assign liability to “Green Building Facilitator”

CASE STUDY: CONTRACTS

- Craft contracts with design & construction professionals
 - Explicitly include green building codes and objectives
 - Designate who is responsible for certification tasks and failure (“Green Building Facilitator” or “Design Builder”)
 - Design and/or performance based?
 - Designate responsibility for permits and compliance

CASE STUDY: COMPLY

- Legal Review of Federal, State, Local Laws
- Critical to identify applicable rules/allocate responsibility
 - Identifying local restrictions could allow for early redesign
 - Asbestos rule
 - Federal permits

CASE STUDY: COMPLY (Continued)

- Identifying environmental reviews for development of timeline:
 - Federal (stormwater, toxic reporting)
 - State Permits/Notifications
 - Local
 - Historic resources (Federal, State, Local)

CASE STUDY: Legal Risks in Marketing A Green Building

- Misrepresentation/fraud claims
- Loss of funding/financing
- Loss of reputation
- Make sure that contingencies are included

QUESTIONS



Note: This Presentation Does Not
Constitute Legal Advice And
Should Not Be Relied Upon For
Any General Or Specific Purpose

Contacts

- **Maureen D. Smith, Esq.**
 - msmith@orr-reno.com
 - (603)223-9166

- **Connie Boyles Lane, Esq.**
 - clane@orr-reno.com
 - (603)223-9129