Legally Green: What Lawyers Need to Know About Sustainable Design

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As Kermit the Frog once sang, "It's not easy being green!" Today, with the overwhelming "Green Wave" that seems to be sweeping the nation, design professionals are finding their world is changing rapidly.

Not Easy Being Green

The American Institute of Architects (AIA) has adopted new board policies on sustainable design; the AIA's 2007 contract forms contain new sustainable design obligations; and the AIA's Code of Ethics and the National Society of Professional Engineers' (NSPE) Code of Ethics, were revised in 2007 to add entirely new sections on sustainability. As of January 1, 2008, 28 states have passed new laws requiring sustainable design considerations for new construction projects, with most of them mandating minimum LEED® certification levels. The Federal government has passed "green" laws for public projects and there are several bills pending in Congress. Hundreds of cities and counties have enacted local ordinances with many variations on LEED requirements and sustainable measures required for both public and private development.

All this activity is leading more property owners to insist on sustainable design for their projects, with high expectations on getting LEED certification for their buildings. In response, manufacturers and suppliers are rushing new products to market to cash in on this opportunity before architects have a chance to test them. And then there is the push for architects and engineers to

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get their own LEED Accreditation so that they can hold themselves out as a certified sustainability professional. As of February, 2008, USGBC reports a staggering 43,000 people have been accredited—not only architects and engineers, by many contractors as well. One contractor in Phoenix reportedly has 120 LEED Accredited Professionals on staff.

Whew! With all of this relatively new activity, we lawyers need to ask: Is the standard of care changing? This paper will examine the legal side of "being green" and conclude that Kermit was right, "It's not easy being green" for design professionals practicing today.

The AIA Official Board Policy (2005)

The AIA Board maintains a list of policies that are updated and revised periodically. In 2005, the AIA Board published its new Directory of Public Policies and Position Statements. The AIA's official Public Policy on sustainable design is:

> The creation and operation of the built environment require an investment of the earth's resources. *Architects must be environmentally responsible* and advocate for the sustainable use of those resources. [emphasis added]

The AIA Board's New Position Statement No. 42 is entitled, "Energy and the Built Environment" and reads:

> The AIA supports governmental policies, programs, and incentives to encourage energy conservation as it relates to the built environment as well as aggressive development of renewable energy sources.

This sounds harmless so far, Mom and apple pie stuff . . . but then it continues,

> *Architects must strive* for energy efficiency and waste reduction in the built environment, encourage energy-conscious design and technology, and support a national program for more efficient use of nonrenewable resources and the development of renewable energy sources. [emphasis added]

A companion AIA Public Policy is titled, "43. Sustainable Buildings," and reads:

> The *AIA supports* governmental and private sector policy programs and incentives to encourage all buildings to exemplify the advantages of sustainable architecture. [emphasis added]

It is interesting that in this section there is only a statement of AIA "support," and nothing that "Architects must do" about it.

Impact of AIA Policies on Standard of Care

What does it mean, legally, when the official national organization for architects come out with these doctrines, adopted by the AIA Board of Directors that say what "architects must do"? Does this raise or change the standard of care for the profession? After all, the AIA is seen as the voice of the profession.

There is one case in which an AIA publication was alleged to set the standard of care. In *Taylor, Thon, Thompson & Peterson v. Cannaday*, 230 Mont. 151, 749 P.2d 63 (Mont. 1988) the plaintiff argued that the AIA's publication, "The Architects' Handbook of Professional Practice" should have been admitted into evidence as controlling authority to establish the architects' duties. The trial

court allowed the AIA book into evidence, which was challenged on appeal as reversible error.

The Montana Supreme Court held that, "The handbook describes the standard of practice for architects in the United States." *Id.*, at. 65. The plaintiff wanted a ruling that any deviation from the standards set forth in that handbook should be deemed negligence per se. The Supreme Court would not go that far, however, holding:

> "While violation of a statute may be classed as negligence per se, violation of other regulations is not generally classed as negligence per se. [citation omitted]. More precisely on point, absent specific statutory incorporation, the provisions of a national code are *only evidence of negligence*, not conclusive proof thereof." *Id.* [emphasis added]

The Supreme Court upheld the lower court's ruling that the AIA handbook standards were properly to be considered as *evidence of a duty* on the part of the architects, but rejected the premise that the violation of AIA standards constituted *negligence per se* on the part of the architects. See also, *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 506 N.E.2d 581 (Ill. 1987), holding that, "Evidence of standards promulgated by industry, trade, or regulatory groups or agencies may be admissible to aid the trier of fact in determining the standard of care in a negligence action."

With cases like these, it can be anticipated that any AIA policy on what "Architect *must* do" to be sustainable may be used as evidence of the standard of care for the profession. See discussion below, on negligence per se.

New AIA Contract Clauses

In October 2007, the AIA unveiled its latest edition of the AIA family of contract documents. As the AIA does roughly each ten years, the Contracts Documents Committee revises the standard form agreements to react to changes in the industry, court cases and, in this case, the AIA Board's policies. It will not be surprising then to learn that the AIA has now made sustainable design a contract obligation. The new language is found in several of the owner-architect agreements, such as the newly minted B101 (2007 edition). Under the heading of Schematic Design Phase Services is the following clause:

> § 3.2.3 The Architect shall present its preliminary evaluation to the Owner and *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. [emphasis added]

Two sections away is this companion clause on sustainable design:

> § 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. The Owner may obtain other environmentally responsible design services under Article 4. [emphasis added]

The AIA has set the bar fairly low in these provisions, which are the end product of multiple re-drafts by the AIA Contract Documents Committee.

Reading these two provisions together, we find that all an architect must do, by contract, is: a) "discuss the feasibility" of incorporating environmentally responsible designs; and b) "consider environmentally responsible design alternatives" which is limited to choice of materials (perhaps new) and orientation of building (something architects are taught in school, and do anyway). So let's not get too excited that the AIA has imposed any unreasonable contract obligations here. Nonetheless, these are brand new duties and the failure to perform them would be a breach of contract. The owner would, of course, have the burden to show financial damages that resulted from the failure to discuss and consider these design alternatives.

If the owner wants more extensive services for sustainable design, we go to Article 4, Additional Services. There, you will find a matrix of various additional services which include these two optional services:

- § 4.1.23 Extensive environmentally responsible design
- § 4.1.24 LEED Certification

For owners seeking LEED Certification, the AIA has an entirely separate form, the B214 (2007 edition), which contains LEED certification services, including submission of certification documentation to the owner at various intervals of the project, a pre-design workshop with the owner, the owner's consultants, and the architect's consultants at which the participants will review the LEED Green Building Rating System, preparation of a LEED Certification Plan based on the LEED points targeted and, ultimately, registering the Project with the USGBC. Clearly firms who sign a B214 Agreement are taking on new duties, not traditionally offered by architects in the past.

AIA's New Ethical Requirements

At its December 2007 meeting, the AIA Board of Directors approved of the addition of an entirely new section to the AIA Code of Ethics and Professional Conduct. Added was "Canon VI, Obligations to the Environment," which contains three "ethical standards (E.S.)." Unlike an AIA ethical "rule" for which an AIA member can be disciplined, an ethical standard is merely a "goal toward which Members should aspire in professional performance and behavior." These "goals" use the verb "should" as opposed to the Board policy of "must" or the AIA contract language "shall." Here are the new ethical provisions:

> Members *should promote* sustainable design and development principles in their professional activities.
>
> *E.S. 6.1 Sustainable Design:* In performing design work, Members *should be* environmentally responsible and advocate sustainable building and site design.
>
> *E.S. 6.2 Sustainable Development:* In performing professional services, Members *should advocate* the design, construction, and operation of sustainable buildings and communities.
>
> *E.S. 6.3 Sustainable Practices:* Members *should use* sustainable practices within their firms and professional organizations, and they should encourage their clients to do the same.[1] [emphasis added]

Again, no AIA member can be disciplined for violating these goals, and whether such AIA-recommended "standards" raise the standard of care is yet to be seen.

NSPE Code of Ethics for Engineers

The engineers beat the architects to the punch by five months by adding a sustainable obligation to the code of ethics. Like the AIA, NSPE's Code of Ethics for Engineers is broken into three subparts, "fundamental canons," "rules of practice," and "professional obligations." Unlike AIA's Code, however, the active verb in all three parts is "shall" and, therefore, the Code is mandatory for the most part. However, there are a few permissive "should" sections (only 4 of them as opposed to 59 uses of the mandatory "shall"). In July 2007, NSPE added new Professional Obligation III.2.d, dealing with sustainable design. This new provision neither uses "shall" nor "should" but uses the term Engineers "are encouraged"—which is perhaps even a weaker term, previously used only twice in the entire NSPE Code. New Obligation III.2.d says, "Engineers are encouraged to adhere to the principles of sustainable development in order to protect the environment for future generations." Footnote 1 then goes on to define "Sustainable development" as "the challenge of meeting human needs for natural resources, industrial products, energy, food, transportation, shelter, and effective waste management while conserving and protecting environmental quality and the natural resource base essential for future development."

Green Marketing Risks

With "green architecture" all the rage, and with owners wanting a LEED Silver or Gold plaque hanging in their lobby, architects and engineers will be tempted to pump up their firm's experience in sustainable design. Brochures will list the number of LEED Accredited Professionals in the firm, the number of certified projects, awards won, etc. Marketing staffs need to be careful here, since the ultimate determination of whether a building is LEED certified depends on lots of factors, such as budget, owner's cooperation, available materials, and, ultimately, the USGBC's decision. Can an architect really assure any client that their facility will meet a specific level of LEED certification?

A few careless oral or written representations by marketing staff or, worse yet, language in a contract such as the architect "warrants," or "guarantees," or "ensures," that the building will obtain a certain LEED rating can result in an uninsured claim for damages. All professional liability insurance policies contain exclusions against express warranties or guarantees. For this reason, firms need to use restraint in promising specific goals. Any more than an architect can guarantee that a building won't leak or crack, an architect or engineer should tie any representations as to LEED levels to the use of "reasonable care to achieve" that level. Even a statement that the architect will use its "best efforts" can be troublesome, since this might raise the standard of care from "reasonable care and skill" to the "best effort" a firm can produce.

The AIA and NSPE Codes of Ethics have several rules aimed at keeping marketing lingo in check. For example, AIA Rule 4.201 says that,

> "Members shall not make *misleading, deceptive, or false statements* or claims about their professional qualifications, experience, or *performance* and shall accurately state the scope and nature of their responsibilities in connection with work for which they are claiming credit."

NSPE's Code of Ethics has a similar provision. Rule II.5.a states that,

> "Engineers shall not falsify their qualifications or permit misrepresentation of their or their associates' qualifications. They shall not misrepresent or exaggerate their responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment *shall not misrepresent pertinent facts* concerning employers, employees, associates, joint venturers, or *past accomplishments*."

NSPE also prohibits engineers from wandering into an area of practice without proper training or experience in Rules II.2 and II.2.a. which state that, "Engineers shall perform services only in the areas of their competence. . . Engineers shall undertake assignments only when qualified by education or experience in the specific technical fields involved." These rules suggest that engineering firms would be well advised to join the other 43,000 people who have passed the USGBC test and become a LEED Accredited Professional.

Could an architect or engineer be disciplined for misleading a client into thinking the project will qualify as LEED Silver or Gold? The companion AIA ethical rule is Rule 3.301, which says,

> "Members shall not intentionally or recklessly *mislead existing or prospective clients about the results that can be achieved* through the use of the Members' services, nor shall the Members state that they can achieve results by means that violate applicable law or this Code."

Again, these rules are intended to restrain architects and engineers from "puffing" and over-selling the results that might be expected from use of that firm's services.

Is the Standard of Care Changing?

When an architect gets LEED Accredited and puts "LEED AP" after his or her name, does this raise the level of care expected by the law? Is the standard for judging his or her performance what another reasonable architect would do in the same situation? Or is it now what another of the 43,000 LEED accredited professional would to? When a person holds themselves out as having certain expertise, it is possible that the courts will hold them to a higher standard. After all, when clients hire firms due to LEED experience and accredited firm members, they expect that level of service.

With AIA policies, contracts and ethics positions saying that architects "must," "shall," and "should" design using sustainable principles, it could be argued that the profession now recognizes this is the minimum level of service required in today's green environment. Certainly AIA-backed positions will be used to show "evidence" of the new standard of care. But what is the standard of care among architects today, in 2008?

Two recent studies show that the profession has lots of catching up to do, and that if the AIA's intent is to raise the bar, the members have not yet received the message. In one study, 83% of the designers surveyed said they feel a

responsibility to offer "green solutions" to their clients . . . but only 17% of the respondents do so.[2] This might be used as evidence that with less than 1 in 5 architects offering sustainable solutions, the "standard of care" is what another reasonable architect would do in the same circumstances—nothing! In the second study, done informally by this author during a nationwide telenar of some 300 architects, the question was asked: "Rate your knowledge on sustainable design."[3] The results:

- 19% None
- 56% Some
- 19% Significant
- 6% Rock Star

So out of a random pool of 300 architects responding to this informal poll, a full 75% of them felt they had "none to some" knowledge of sustainable design, with only 25% claiming significant or better! Again, this reinforces the idea that, as of this point in time, the standard of care among the architectural profession—as judged by peers—is below where AIA would like to see it. Architects have little knowledge on the subject and, as a result, are not offering sustainable design solutions to their clients. Education on sustainable design dominated the AIA 2007 national convention, and will again in Boston in 2008, in an effort to train architects and encourage them to adopt the AIA Board policies and ethical goals. But we are not there yet.

Green Laws and Negligence Per Se

As of January 1, 2008, there are at least 67 statutes or executive orders passed in 28 states, plus dozens more pending in the various state legislatures which promoted green design. 375 mayors of large and small cities from all 50 states and the District of Columbia have signed the U.S. Conference of Mayors' Climate Protection Agreement. Hundreds of cities and counties have passed green ordinances that require LEED certification or similar levels of sustainable design. These laws are being passed faster than architects can keep up.

So what happens if an architect's or engineer's design fails to meet the requirements of a local city green ordinance? Does the ordinance establish the standard of care, or is it merely "evidence" of negligence? The answer depends on the state in which the project is located, or the law that governs the contract.

In several states, a violation of the building code is considered to be negligence per se when the violation results in the harm the building code was designed to prevent.[4] For example, in a 1995 Montana case, an architect was found negligent for failing to design guard rails per the Uniform Building Code (UBC). The Court held that, "when the Uniform Building Code is adopted by local ordinance, failure to comply with the U.B.C. is a violation of a city ordinance, and therefore, is negligence per se."[5] In other states, however, the violation of a building code is merely "evidence" of negligence.[6]

The state of Washington happens to be a strict follower of the negligence per se doctrine. In a 1985 case, the state's Supreme Court explained that, "A primary rationale for the negligence per se doctrine is that the Legislature has determined the standard of conduct expected of an ordinary, reasonable person; if one violates a statute, he is no longer a reasonably prudent person."[7] The

Court added,

> Negligence per se exists when a statute or ordinance is violated, and that law is designed to (a) protect a class of persons which includes the person whose interest is invaded, (b) protect the particular interest which is invaded, (c) protect against the kind of harm which resulted, and (d) protect that interest against the particular hazard from which the harm results.

In a concurring opinion in that case, Justice Brachtenbach observed, "The finding of negligence is normally a task for the trier of fact. Through the application of the negligence per se doctrine we have taken that task away from the jury and the court now decides when a violation of statute constitutes negligence." *Id.,* at p. 1187. In other words, when the statute is violated, we don't need expert witnesses to tell the jury what the standard of care is, since the statute establishes that standard. Violating the statute is negligence, end of discussion!

While no comprehensive survey was done for this paper, the Washington Supreme Court noted in that same 1985 case that: 1) the majority of American jurisdictions follow the negligence per se doctrine and find that a breach of statutory duty *is a breach of standard of care for civil negligence cases*; 2) seven states follow the theory that a breach of a statutory duty is *evidence of negligence* in civil action; and 3) five states hold that a violation of a statute is *prima facie negligence* which may be rebutted by competent evidence. *Id.*, at pp. 1187-88. The English rule is to consider a breach of a statutory duty a tort in itself. The Canadian Supreme Court follows the American minority rule which considers the violation to be *mere evidence* of negligence.[8]

With more of these "green" laws being passed, architects and engineers in strict negligence per se states need to understand the strict liability that the law imposes on them, and be sure that they comply with such laws.

New Products, New Risks and Informed Consent

With the hyper-growth of LEED certifications and laws encouraging green building, the construction industry is flush with new products aimed at cashing in on the sustainable movement. Manufacturers are putting new products on market, with limited time for research and virtually no product history of performance. Go to the Energy Star web site, (**www.energystar.gov**), and you will find a link to new products, with this note, "Products in more than 50 categories are eligible for the ENERGY STAR. They use less energy, save money, and help protect the environment." Architects and engineers who specify such products rely on the manufacturer's data but may have no actual experience with product performance. So who bears the risk of specifying experimental products? The client or the design professional? While permeable paving allows more water to return to the earth, how does it hold up under freeze/thaw cycles? Who pays to tear up a two-foot thick "green roof" to get access to a leaking roof membrane? What happens when a "grey water" system does not produce enough water to fixtures or, worse yet, spreads some virus to those who come into contact with "dirty" water?

There is some government-sponsored research going on, for example,

Technology for a Sustainable Environment is a joint program begun in 1994 between the EPA's Office of Research and Development and the National Science Foundation to fund environmental research into green design and sustainable products. The program has given grants of over $47 million for 164 research projects. The for-profit sector is also engaged in research and development of more environmentally friendly products, hopefully those that will earn LEED points! However, when a product or system is selected with an eye toward LEED points, it may not fulfill the owner's needs in terms of building performance. In those cases, the architect and engineer is a likely target for claims. So what's a design professional to do?

It is important that designers have full disclosure and risk sharing with their clients when decisions are made to use un-tested products. Mock-up samples can be built, wind tests and water tests can be run, and manufacturer's data should be analyzed and shared with the client. But in the end, the client should give *informed consent*, just as doctors do with patients undergoing experimental treatment. In the medical profession, courts have held that under the law, a physician or surgeon who proposes a treatment or surgical procedure has a duty to provide the patient, "with enough information about the nature of the treatment or procedure involved to enable the patient to make an intelligent decision and thereby give an informed consent to the treatment or procedure."[9] When the patient is involved in some "experimental" treatment, the patient must also be informed of: 1) alternative methods of treatment, 2) the risks and benefits of such treatment and, if applicable, 3) that the proposed treatment or procedure is experimental. In some states, if a doctor performs the treatment or procedure *without* the requisite informed consent of the patient, the doctor can be held liable for the resulting injuries "regardless of whether those injuries resulted from negligence."[10]

While this concept has not expanded to the construction industry, design professionals would be wise to follow the lead of the medical profession when using experimental materials or systems, by informing the client of: 1) alternative methods and materials (just as the new AIA B101, Par. 3.2.3 and 3.2.5.1 require), 2) the risks and benefits of such sustainable materials, and if applicable, 3) that the proposed use of such material or system is untested with this architect and, therefore, experimental. Architects and Engineers should obtain the written consent of the client on all such decisions, just like the doctors, so there is no question that the client participated in the risk, in order to reap the rewards of using new materials and systems on his or her building project.

Waiver of Consequential Damages

With the risks of green design running to loss of LEED, possible financial penalties, loss of public financing, marketing embarrassment for the client (who announced LEED Gold, only to get LEED Silver), it is more important than ever to use a waiver of consequential damages clause in the owner-architect agreement. The B101 (2007 edition) AIA Owner-Architect Agreement contains such a waiver (although not labeled as such) in Paragraph 8.1.3, which states, "The Architect and Owner waive consequential damages for claims, disputes or

other matters in question arising out of or relating to this Agreement." The term "consequential damages" is not defined in the B101, but Paragraph 10.2 states that, "Terms in this Agreement shall have the same meaning as those in AIA Document A201–2007, General Conditions of the Contract for Construction." So we look to the A201 and find in Paragraph 15.1.6 that consequential damages means, "damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons." That's a very broad waiver and would include some of the damages that might flow from failure to obtain a required LEED certification. Be careful about deleting this waiver on projects that have sustainable design requirements.

Conclusion: Kermit Was Right!

Leave it to the lawyers to pour cold water on a great idea, but there is risk in anything an architect or engineer does. Sustainable design is no different, and it has its risks. Kermit was right: It is not easy being green, nor being a green architect or engineer! With new laws, new products, and new expectations from clients, design professionals need to be keenly aware of their duties under contract and applicable statutes and ordinances. The bar may be raised for performance and architects have to perform to that level or run the risk of additional claims from their clients.

Endnotes

[1]AIA 2007 Code of Ethics & Professional Conduct (Dec. 2007).

[2]AIA Members Strive to Be "Legally and Ethically" Green, *AIArchitect*, Jan. 11, 2008.

[3]Jan. 15, 2008 St. Paul/Travelers Webinar on AIA's New B101 Owner-Architect Agreement.

[4]See, e.g., *Thies v. St. Paul's Evangelical Lutheran Church*, 489 N.W.2d 277, 280 (Minn. App. 1992); *Pasour v. Pierce*, 333 S.E.2d 314, 317 (N.C.App. 1985).

[5]*Pierce v. ALSC Architects*, P.S., 890 P.2d 1254, 1258 (Mont. 1995).

[6]See, e.g., *Grand Union Co. v. Rocker*, 454 So.2d 14, 16 (Fla. App. 3 Dist. 1984) ("we conclude that the violations of the South Florida Building Code demonstrated in this case are only prima facie evidence of negligence and not negligence per se.")

[7]Bauman by *Chapman v. Crawford*, 704 P.2d 1181, 1184 (Wash. 1985).

[8]*The Queen v. Saskatchewan Wheat Pool*, 143 D.L.R.3d 9 (1983); *s*ee also Note, *Negligence and Breach of Statutory Duty*, 4 Oxford J. Legal Stud. 429 (1984), as cited in Bauman by *Chapman v. Crawford*, 704 P.2d 1181, 1188 (Wash. 1985).

[9]*Shadrick v. Coker*, 963 S.W.2d 726, 732 (Tenn. 1998).

[10]*Id.*