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Legal Issues in Green Construction

Presented by Kathlynn E. Smith, Esq. &
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Hunt Ortmann Palffy Nieves Darling & Mah, Inc.



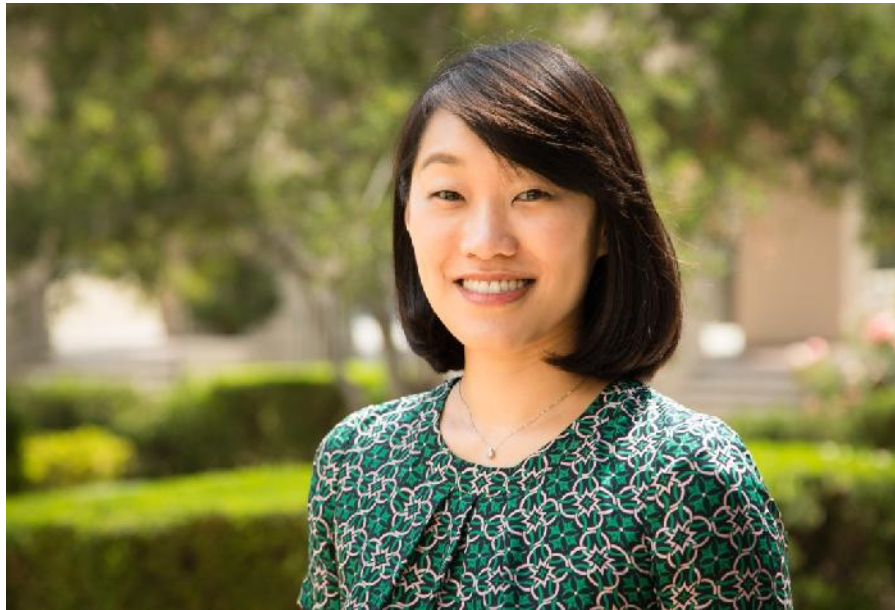
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Kathlynn E. Smith
Shareholder

Kathlynn Smith represents clients in a wide variety of construction-related matters, including claims involving payment disputes, delay and disruption, false claims, construction defects, and actions on payment and performance bonds. Ms. Smith has successfully litigated and resolved complex construction disputes involving multi-million dollar claims.

Ms. Smith is the co-author of the "Smart Girls' Guide To Construction Law" and architect of the "Smart Girls'" initiative directed at supporting women-owned and/or operated companies in the construction industry. Learn more at www.smartgirlsconstruction.com.



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Jennifer Tung
Associate

Jennifer Tung is an associate attorney with Hunt Ortman. She focuses her practice on a broad array of matters, including breach of contract claims and construction defect litigation. Ms. Tung has represented a diverse client base including, owners, contractors, transportation companies, insurers, universities, and health care providers.

Prior to attending law school, Ms. Tung worked as a professional political organizer. Her work included building support to pass AB 32, the California Global Warming Solutions Act of 2006.

Green Construction on the Rise

- In 2017, 33% of all single family home builders had either “high involvement” in green projects or were “dedicated” green builders.
- By 2022, the number of single family home builders working predominately on “green” projects expected to rise to 44%.

Green Construction on the Rise

- In 2017, 36% of multi-family home builders had either “high involvement” in green construction or were “dedicated” green builders.
- By 2022, this is expected to increase to 47%, with nearly 40% of respondents expecting to be “dedicated” green builders.

How to Get to Green?



Why Green?



What is “Green” Construction?



U.S. Environmental Protection Agency

“Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle from siting to design, construction, operation, maintenance, renovation and deconstruction.”

U.S. Environmental Protection Agency

“This practice expands and complements the classical building design concerns of economy, utility, durability, and comfort. Green building is also known as a sustainable or high performance building.”

(EPA Archives, last updated 2/20/2016).

AIA Approach

- AIA B214-2012 Standard Form of Agreement of Architect's Services: LEED Certification
- A101-2007 SP (Owner and Contractor)
- A201-2007 SP (General Conditions)
- A401-2007 SP (Contractor and Subcontractor)
- B101-2007 SP (Owner and Architect)
- C401-2007 SP (Architect and Consultant)

AIA Approach

- E204-2017 (Sustainable Projects Exhibit)
- Sustainability Plan (Contract Document):
 - Sustainable Objective
 - Sustainable Measures and Implementation Strategies
 - Roles and Responsibilities;
 - Details Design Review, Testing, and Metrics to Verify Achievement
 - Sustainability Documentation Required

AIA Approach

- Risk Allocation:
 - Standard of Care
 - No Guarantee That Sustainable Objective Achieved
 - Sustainable Objective Not a Condition Precedent to Substantial Completion or Final Certificate of Payment
 - Limitation of Liability for Failures of “New” Materials/Equipment
 - Waiver of Consequential Damages

ConsensusDocs Approach

- ConsensusDocs 310 – Green Building Addendum (GBA)
 - Design-Bid-Build
- Green Building Facilitator (GBF)
 - Not Part of Owner/Development Team
 - Primary Role: Coordinate and Facilitate Obtaining Elected Green Status

ConsensusDocs Approach

- Risk Allocation: Article 8
 - GBF Responsible for Failure of Elected Green Measures to Achieve Elected Green Status
 - Design Professional Responsible for Plans and Specifications
 - Contractor Responsible for Means and Methods of Performing the Work
 - Waiver of Consequential Damages?

DBIA Approach

- Sustainable Project Goals Exhibit
 - Integrated DBIA Document
 - LEED-Centric
 - Owner Identifies Applicable Sustainability Laws, Codes or Standards

DBIA Approach

- Risk Allocation:
 - Limited Liability for Owner-Chosen Sustainable Products/Materials Fail
 - Substantial/Final Completion Not Contingent Upon LEED Certification
- Article 4: Remedies (Failure to Obtain LEED)
 - Must appeal first (Paid by Owner)
 - If Appeal Fails:
 - Waiver;
 - Liquidated Damages; or
 - Limited Obligation to Cure

Case #1: Failure to Obtain LEED Certification

- *Southern Builders, Inc. v. Shaw Development, LLC* (MD, 2007)
- Multi-million waterfront mixed-use construction (condos, restaurant and boat blips)



Southern Builders

- 8% Tax Credit if LEED Silver, and Project Completed by a Certain Date
- Southern Builders (GC) Pursued a Mechanic's Lien Claim
- Shaw Development (Owner) Counterclaimed for Breach of Contract and Negligence

Southern Builders

- Owner claimed contractor failed to complete the project on time and failed to meet LEED rating system requirements
- Owner alleged it was entitled to \$635,000 in damages – the amount of the lost tax credit

Southern Builders – What Went Wrong?

- Parties used AIA A101 1997 (Standard Form of Agreement Between Owner and Contractor)
- Contract incorporated following language:
 - “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, as specified in Division 1 Section “LEED Requirements.”
- No other mention of “green” objective

Case #2: Failure to Obtain LEED Certification

Bain v. Vertex Architects, LLC (IL, 2010)



Bain

- Homeowner alleged breach of contract because architect failed to obtain LEED certification
- Contract documents stated that project objective was “to create a sustainable green modern single family home”

Case #3 – “Defective” Sustainable Materials

- *Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co. (MD, 2011)*
- Phillip Merrill Environmental Center



Chesapeake Bay Foundation

- First LEED Platinum Building
- Project was to incorporate “recycled and environmentally-friendly construction products”
- Design included a roof truss system with columns and beams exposed to the elements, built from parallams

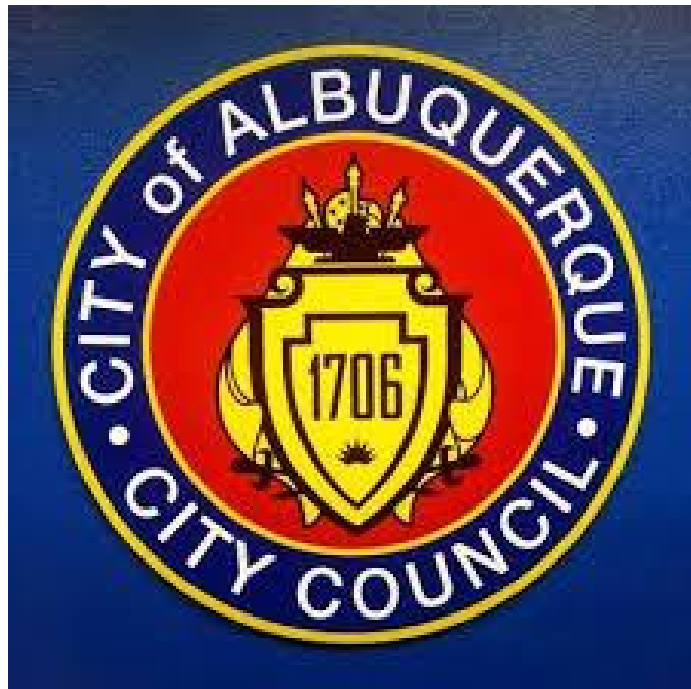
Chesapeake Bay Foundation

- After several years of exposure to the elements, the parallams began to rot because they had not been properly treated with chemical preservatives
- The owner, architect and general contractor settled their differences and sued the supplier of the parallams

Chesapeake Bay Foundation

- Supplier allegedly provided “defective, inferior, and or unsuitable building products...”
- Plaintiffs alleged over \$6 million in damages for:
 - Breach of Contract
 - Common Law Indemnity
 - Contribution
 - Negligent Misrepresentation
 - Negligence

Cases #4 and #5: Challenges to State “Green” Building Requirements



*Air Conditioning, Heating and Refrigeration, Inst.
V. City of Albuquerque (NM, 2010)*

- HVAC trade groups sued City for enacting energy conservation code that was more stringent than federal law.
- 2010 Ruling: Prescriptive compliance paths preempted
- 2012 Ruling: Performance compliance paths not severable, therefore, also preempted

*Building Indus. Ass'n of Washington v.
Washington State Building Code Council
(WA, 2012)*

- Plaintiffs challenged state requirement that new buildings meet heightened energy conservation goals
- Ruling: More stringent energy efficiency standards **OK** if it is possible to meet those standards by using products that comply with less restrictive federal requirements

Case #6: Challenges to LEED

- *Gifford v. USGBC* (NY, 2011)
- Issue: Does LEED divert customers to LEED-accredited professionals?
- Dismissed on standing grounds



Other Potential Disputes to Plan For:

- Failure to meet anticipated or stated claims in marketing or promotional materials
- Failure to obtain anticipated lower operating/energy costs
- Delay due to lack of sustainable materials
- Gaps in insurance coverage

Lessons
Learned

Finis

Question And Answers

Thank you!

If you have any questions, please feel free to contact us at smith@huntortmann.com and tung@huntortmann.com

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