



WHITE PAPER:

Managing the Risks and Embracing the Benefits of Going Green

**Prepared for
The AIA Trust**

FEBRUARY 2008

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EXECUTIVE SUMMARY¹

Here are the highlights of this White Paper as it relates to managing the risks and embracing the benefits of going green:

- **AIA Official Board Policy (2005).** The AIA Board has adopted a Public Policy on the responsibility of architects to be environmentally responsible, to strive for energy efficiency, and for the AIA to support public and private programs to encourage sustainable architecture.
- **New AIA Contract Clauses.** The 2007 AIA Contract Documents contain brand new clauses that make it a contract obligation for architects to discuss with their clients the feasibility of incorporating environmentally responsible design approaches, and require the architect to consider environmentally responsible design alternatives.
- **New AIA Ethical Requirements.** In December 2007, the AIA revised its Code of Ethics and Professional Conduct to include a totally new section dealing with the AIA member's Obligations to the Environment. These "ethical standards" are merely goals to strive for, but in themselves to not impose any ethical duty for which an AIA member might be disciplined.
- **Impact of AIA Policies on Standard of Care.** With these new Public Policies, Contract Clauses and Ethical Standards saying what architects should or shall do, is the standard of care changing for the architectural profession? The White Paper discusses this in light of studies that have shown that most architects are not offering sustainable design alternatives because they are not yet educated on this topic sufficient to engage in that area of practice.
- **The Standard of Care for those who hold themselves out at LEED® Accredited Professionals.** Is it the same for all architects? or is a LEED® AP architect held to a higher standard? The White Paper discusses this timely issue.
- **Green Marketing Risks.** With clients wanting to achieve a certain LEED® level for their building project, architects need to be careful not to oversell the results that can be

¹ The authors, G. William Quatman, FAIA, Esq. and Ryan Manies, AIA, Esq., are both licensed architects and attorneys with the law firm of Shughart Thomson & Kilroy, P.C. This paper is not intended as legal advice but as a survey of legal issues related to sustainable design. Readers are cautioned to seek competent legal counsel in their home state or project state for advice on the law for any particular situation.

achieved. After all, LEED® Certification is subject to many factors that are beyond the architect's control. Warranties or guarantees made in marketing or contacting are normally not insurable under an architect's professional liability policy.

- **Green Legislation.** More and more states and cities are passing “green laws” which require new public buildings and, in some cases, private buildings, to achieve a certain LEED® Certification level. Architects must comply with applicable laws, regulations and codes that contain these requirements. Staying abreast of changing laws will be a challenge. To help, AIA Trust provides the actual text of all current State laws on sustainable design as **Appendix A**, the most current resource available on laws that were enacted by December 31, 2007. To see what types of local laws have been passed, the AIA Trust provides a sampling of Major City Laws as **Appendix B**, with hot links to the actual city ordinances and resolutions.
- **Negligence Per Se.** In many states, if a statute or ordinance has a requirement for building construction, the architect is deemed “negligent” if the design does not comply with the law. There is no need for expert testimony on the standard of care, since the law itself sets the standard, and a violation of the law is considered negligence without more proof. These green laws can create a standard for measuring an architect's performance.
- **Waiver of Consequential Damages.** With clients expecting to reap benefits of sustainable design, there can be damages far beyond the normal cost to repair a defective design. Tax benefits and public incentives may be lost if LEED® certification is not achieved, tenants may try to break leases if LEED® certification was a lease requirement, and corporate images may be damaged if a “green” marketing campaign falls flat for failure to achieve LEED® status. Architects need to consider use of AIA-standard waivers in their contracts against consequential damages.
- **New Products and Informed Consent.** So many new products are hitting the market in an effort to cash in on the “Green Wave” of business. As compared to more traditional building products that have a history of performance, these new products are untested and architects have no prior experience in their use. Should architects take a cue from the medical profession and have the clients agree to share in the risk of using experimental products like these? A sample form is included as **Appendix C** for consideration and discussion.

I. INTRODUCTION: THE GREEN WAVE OF BUSINESS

“Buildings account for 39 percent of total energy use and 38 percent of carbon dioxide emissions.”

- *Green Buildings: Why Build Green?* U.S. Environmental Protection Agency (2005)

“The impact of green going mainstream will be as profound on commercial real estate as the invention of elevators in the 19th Century or central air conditioning in the 1950's and 1960's. Owner's of standard buildings must act now to protect their investments.”

- Charles Lockwood, *Building the Green Way*, Harvard Business Review (June 2006).

Today, with the overwhelming *Green Wave* that seems to be sweeping the nation, design professionals are finding their world is changing rapidly, as it is for their clients. Corporate sustainability is the buzz word all over the globe. Companies like Wal-Mart Stores Inc. promise to slash energy use overall, from its stores to its vast trucking fleets, and purchase more electricity derived from renewable sources. Dow Chemical Co. is increasing research into products such as roof tiles that deliver solar power to buildings.² Ford Motor Co. put on a 10-acre grass roof to capture rainwater on its main plant, and its designers are incorporating sustainable materials into vehicle interiors. Mega search engine *Google* announced in November 2007 that it will spend hundreds of millions of dollars over the coming years to develop renewable energy technologies, with a corporate goal of producing one gigawatt (enough power to serve the City of San Francisco) of renewable energy through solar, geothermal and wind power cheaper than that produced by coal-generated power.

It is therefore no surprise to find that the American Institute of Architects (AIA) has adopted new Board Policies on sustainable design, policies that have impacted everything from Contract Documents, to the Code of Ethics, to continuing education. The AIA's 2007 national convention theme for its 150th anniversary celebration was “Growing Beyond Green,” which highlighted sustainable design under the subtitle, “how you can green your projects, educate your clients, and reduce the impact buildings have on the environment.” Later that year, when the

² *Beyond The Green Corporation*, Business Week, Jan. 29, 2007 (cover story).

AIA released its new 2007 Contract Documents there were brand new clauses dealing with sustainable design obligations. At the close of 2007, the AIA Board adopted a revised Code of Ethics which added an entirely new section devoted to the environment.

One of the most remarkable statistics is that while the AIA boasts 83,500 members nationwide after 150 years, the U.S. Green Building Council (USGBC) reports 43,000 individuals have become LEED® Accredited Professionals . . . just since 2001. More than likely someone in your firm is already a LEED® AP or is taking the test soon. Whether you and your firm have fully embraced the green movement, your city council and state legislature may already have. As of January 1, 2008, twenty-eight states have passed new laws requiring sustainable design considerations for new construction projects, with most of them mandating minimum LEED® certification levels.³ See **Appendix A**. 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. See **Appendix B**. The Federal government has passed “green” laws for public projects and there are several bills pending in Congress. All this activity is leading more private and public property owners to insist on sustainable design for their projects, with high expectations on getting LEED® certification for their buildings.

Have you considered the legal issues associated with sustainable design? Do you even know what they are? As Kermit the Frog once sang, “*It’s not easy being green!*” Kermit’s comment could just as easily apply to architects today who are trying to keep abreast of this new wave of technical changes and legal responsibilities. “Green design” is clearly not a fleeting movement like trendy diets. Major corporations have pledged to be “greener” in the way they conduct business, reduce their “carbon footprint,” and they expect their architects to deliver more sustainable buildings. Even the average member of the public is more aware today than ever of the risk of global warming and dependency on non-renewable energy sources. As oil prices top \$100 per barrel and gasoline over \$3.00 per gallon, consumers have woken up to the benefits of alternative energy sources. Senator Al Gore’s Academy Award and Nobel Peace Prize for *An Inconvenient Truth* brought the message to millions who have seen his movie or read his books, and so even smaller clients are looking for ways that their buildings can be less polluting, with fewer greenhouse gas emissions, and lower energy costs.

³ The Leadership in Energy and Environmental Design (LEED®) Green Building Rating System.

The growing popularity of green design among owners and developers is spurred not only by moral considerations of being environmentally responsible, but by tax incentives, legislation, stronger building codes and the increasing cost of building materials. Green design is less of a choice for architects and more of a mandate. 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. It may not be long before we see law firms who specialize in sustainable litigation in the way we have seen lawyers who have pursued condominium claims. So now is the time to educate yourself and your firm members on managing the risks and embracing the benefits of going green.

This paper will address the risks of green design and help architects to make informed decisions about sustainable design and its potential risks.

II. AIA POLICIES, CONTRACTS AND ETHICS GOALS

A. The AIA Official Board Policy (2005).

The AIA Board maintains a list of policies that are updated and revised periodically to help guide the organization and its myriad of committees and knowledge communities. In 2005, the AIA Board published its new Directory of Public Policies and Position Statements which included the AIA's first official Public Policy on sustainable design. The policy 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).

This is a strong statement for the national organization to make about what their members “must” do, but it shows the importance the AIA places on sustainable design. 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.” (emphasis added)

This is a statement with which nobody can argue, and is so broad that it does not carry any legal implications. 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).

This is a much stronger statement, a mandate of what not only AIA members should do, but what all architects “must do” in their professional practices. A companion AIA Public Policy is titled “43. Sustainable Buildings” 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).

These broad association policies are intended to guide the organization in its future positions on legislation, form contracts, convention topics and continuing education requirements. But those policies sometimes result in legal obligations for AIA members when policies result in contract language, such as the new 2007 AIA contracts.

B. 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. As expected from the Board policies quoted above, 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 design⁴:

§ 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.

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 to be sustainable, 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 there is no need for concern that the AIA has imposed any unreasonable contract obligations here. Nonetheless, these are brand new duties and the failure to perform them will 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. Damages could range from higher energy costs, to damage to corporate reputation, to lost public finance incentives.

If the Architect’s client wants more extensive services in the area of sustainable design, such services can be added to the Owner-Architect Agreement in Article 4 of the B101™, titled 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 (B214™–2007)

⁴ NOTE: similar contract provisions are found in other AIA owner-architect agreements: B103, sections 3.2.3 and 2.3.5.1; B104, section 3.2.2; and B201, sections 2.2.3 and 2.2.5.1.

For owners seeking LEED® Certification, the AIA publishes 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 architects who sign a B214™ Agreement are taking on new duties, not traditionally offered by architects in the past, and will be expected to fulfill those duties to their clients. The process of documenting and applying for LEED® certification is quite complex for those who have not been through it before.⁵ If your staff is not familiar with the process, consider hiring an outside consultant to guide you and your client through your first one.

Practice Tip #1: Read the new AIA B101™ contract language dealing with sustainable design. Understand what is required and train or hire staff who are knowledgeable on sustainability. If your firm is not yet ready to counsel clients on sustainable design, delete these provisions from your contracts until such time as you can fulfill these duties.

Practice Tip #2: If your client wants extensive environmentally sustainable design, check the matrix of Additional Services, § 4.1.23 of Article 4. Adjust your fee accordingly. If your client wants LEED® Certification services, check the matrix box § 4.1.24 and utilize an AIA Document B214™–2007 as an attachment to your contract. Be certain you have staff knowledgeable on the LEED® certification process. If not, retain an outside consultant to either handle this totally or to guide you through it.

C. AIA’s New Ethical Requirements.

Consistent with the AIA Board’s published policy statements that architects “must” strive for energy efficiency and waste reduction in the built environment, it might have been expected that the Institute would impose ethical sanctions against its members who do not heed the call. However, the AIA Board did not go quite that far with the AIA Code of Ethics and Professional Conduct was revised in December 2007 to address sustainable design. Let’s examine how the AIA handled this topic.

⁵ For a summary of the process, see *Steps Towards LEED Certification*, adapted from The Architect’s Handbook of Professional Practice, Update 2005, available on-line in pdf at: www.aia.org/SiteObjects/files/bestpractice_18_11_09.pdf

As a refresher, the AIA Code of Ethics is arranged in three tiers: (1) Canons, (2) Ethical Standards, and (3) Rules of Conduct. The initials "E.S." stand for "Ethical Standards," which, according to the Code are "more specific goals toward which [AIA] Members should aspire in professional performance and behavior." Therefore, unlike Rules of Conduct (the violation of which can result in disciplinary action), a violation of one of the Ethical Standards is not grounds for disciplinary action by the AIA.

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 new "ethical standards." These ethical "goals" use the verb "should" as opposed to the Board policy of "must" or the AIA Rules of Conduct and contracts, both of which use the mandatory term "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.⁶ (emphasis added).

Again, no AIA member can be disciplined for violating these goals. However, will the more aggressive plaintiff lawyers argue that an AIA Ethical Standard should be admitted as evidence of the standard of care? Does the national architect organization's policy on what its members "should" do alter the standard of care? Courts have not yet addressed these questions since the ethical provisions are so new. But architects would do well to heed the strong suggestion given in these new Ethical Standards when approaching a new project.

⁶ AIA 2007 *Code of Ethics & Professional Conduct* (Dec. 2007).

Practice Tip #3: Become familiar with the AIA’s new Canon VI, Obligations to the Environment. Regardless of what your contracts say about sustainable design, consider: advocating for sustainable building and site design, and encouraging clients to use sustainable practices. These are not legal obligations, but practices that the AIA recommends that their members strive for.

D. Impact of AIA Policies on Standard of Care.

What does it mean legally when the official national organization for architects comes out with policies, adopted by the AIA Board of Directors, that say what “architects must do”? Does this raise or change the standard of care for the architectural profession? After all, the AIA is seen as the voice of the profession by many. The mere letters “AIA” on a business card have come to be accepted as the equivalent of the words, “registered architect.” We can look to case law to see how courts have treated AIA and industry publications and standards in the past to try to forecast how a court might decide today on the issue of sustainability.

There is just one reported state supreme court case in which an AIA publication was alleged by the plaintiff’s lawyer to set the standard of care for the project’s architect. In a 1988 Montana Supreme Court case 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’ standard of care.⁷ The trial court allowed the AIA Handbook into evidence, which was challenged on appeal by the architectural firm as an error. On appeal, the Montana Supreme Court acknowledged that, “The [AIA] handbook describes the standard of practice for architects in the United States.”⁸ The plaintiff wanted a ruling that any deviation from the standards set forth in that AIA Handbook should be deemed outright negligence, without any further proof (a legal theory known as “negligence per se” as discussed in Section III.F, below.) The state supreme court would not go that far, however, ruling that:

“While violation of *a statute* may be classed as negligence per se, violation of other regulations is not generally classed as negligence per se. 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).

⁷ *Taylor, Thon, Thompson & Peterson v. Cannaday*, 230 Mont. 151, 749 P.2d 63 (Mont. 1988).

⁸ *Id.*, at. 65.

The supreme court agreed with the lower court that the AIA Handbook standards were properly admitted into evidence to be considered as *evidence of a duty* on the part of the architects, but rejected the premise that the violation of AIA standards in and of itself constituted *negligence* on the part of the architect. This ruling is consistent with how many other courts have ruled on the use of industry publications to prove negligence. One Illinois court put it this way, “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.”⁹ So it seems that AIA publications and standards may be admitted into evidence by some courts to help the jury understand the standard of care. 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. A jury would then have to determine if the architect’s conducts fell below the standard, and if that conduct resulted in damages to the architect’s client. See discussion in Section III.F, below, on *negligence per se*.

Like any new development in architecture, change comes with new legal obstacles and hurdles with respect to rules, regulations, statutes, codes and professional responsibility. Knowledge of green building laws thus becomes more important to architects who deal with clients whose projects are subject to those laws. The current state laws as of December 31, 2007 are set out in **Appendix A** to this White Paper for your convenience.

Practice Tip #4: Check **Appendix A** with regard to any project within one of the twenty-eight states who have adopted sustainable design laws. Check also with the city and county in which your project is located for any local laws on sustainable design. These may not be in the building code, but may be a special ordinance or resolution. Understand that failure to comply with such applicable law may be used as evidence of negligence and, in some states, may be deemed negligence per se.

III. LEGAL ISSUES

A. Standard of Care

The term "standard of care" is used by courts to define negligence or “malpractice” by a professional, whether that be an architect, an engineer, a doctor or a lawyer. Since a jury normally consists of lay people who are not licensed in those professions, the courts allow the use of “expert witnesses” to testify about the standard of the profession. This evidence helps the jury to understand what normal architects would do in the same or similar situation, and whether

⁹ *Ruffiner v. Material Service Corp.*, 116 Ill.2d 53, 506 N.E.2d 581 (Ill. 1987).

the defendant-architect met that standard, or fell below it. If the latter, then the jury may determine that the architect was negligent and assess damages.

The standard of care can be raised by a contract clause, e.g. one that says an architect will perform to the “highest standards of the profession” raises the bar substantially. An architect signing such a clause will need to show what the best architects in the nation do, not just what another normal architect would do. When a contract says that an architect is an “expert” in a certain area, this implies that the architect is better than the average professional, and has some expertise. In such cases, it can be argued that the standard of care should be that of other “experts” and that the architect has raised the bar in terms of its level of performance and client expectations.

B. Does Being a LEED®-AP Raise the Standard of Care?

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? Or raise the expectations of clients? 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 LEED® Accredited Professional would do?

This last question becomes even more important as we embrace a new era of architects holding themselves out to the public as have certain credentials in sustainable design, as in the title LEED®-AP (“LEED® Accredited Professional”). Taking this title for its face value, it would appear that architects who use this title intend to hold themselves out as having some special knowledge, beyond what a typical architect would have. But does this rise to the level of an “expert” who should be held to a higher standard of care than his or her peers who are not “accredited”? 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.

The website for the U.S. Green Building Council (USGBC) states, “LEED Professional Accreditation distinguishes building professionals with the knowledge and skills to successfully steward the LEED certification process. LEED Accredited Professionals (LEED APs) have demonstrated a thorough understanding of green building practices and principles and the LEED Rating System.” There is no statement that LEED®-AP’s are *experts*, nor that they are held to

the *highest standards* of the profession; only that they are “distinguished” from others by certain knowledge and skills.

According to USGBC (February 2008), more than 43,000 people have earned the LEED®-AP credential since the Professional Accreditation program was launched in 2001. It is therefore possible that in a case of malpractice against an architect who is a LEED®-AP, that the standard of care would require testimony by another LEED®-Accredited Professional since an average architect might not have any special knowledge on the topic to render an opinion. With a pool of 43,000 LEED®-AP’s out there, a court might find that the standard of care in such a specialized niche of the architectural field is different.

The legal standard of care for architects is set out by statute or regulation in some states, such as Missouri’s licensing law, 4 C.S.R. 30-2.010(2), which says that a design professional, “shall act with reasonable care and competence, and shall apply the technical knowledge and skill which are ordinarily applied by registered architects, professional engineers or land surveyors of good standing, practicing in Missouri.” No reference is made to any sub-specialty, or LEED®-Accreditation, implying that the standard of care is the same for all registered architects in Missouri. Any architect in good standing, practicing in the State may be qualified to opine then on the standard of care, without need for a special LEED®-Accreditation.

Therefore, in the absence of a contractually created or statutorily mandated higher standard of care, the standard of care is based on what other professionals providing the same services in the same community would do.

Practice Tip #5: Watch for any contract clauses that attempt to raise the standard of care with words like, “highest standard,” or “best,” since these may be uninsurable. Architects are insured for professional negligence as determined by the law of the project State. Contracts that raise the standard of care may be enforced literally and jeopardize insurance coverage upon which you and your client rely.

C. Is the Standard of Care Changing?

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 may be argued as “evidence” of the new standard of care. But what is the standard of care among practicing architects today, in 2008? As judged by what is actually going on in the profession?

Two recent studies show that the sustainable standard of care is fairly low today, and that the profession has lots of catching up to do. 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.¹⁰ This might be used as a defense to a negligence claim, 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 during a nationwide *telenar* of some 300 architects, the question was asked: “Rate your knowledge on sustainable design.”¹¹ The results:

19% None
56% Some
19% Significant
6% “Rock Star”

So out of a pool of random 300 architects nationwide, responding to this informal poll, a full 75% of them felt they had “none to some” knowledge on sustainable design, with *only* 25% claiming significant or better! Again, this reinforces 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, despite the new AIA contracts and policy statements. This may change, of course, as education on sustainable design increases – the same way architect proficiency with CADD or BIM technologies increase with time and usage. The subject dominated the AIA 2007 national convention in San Antonio 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 as a profession, according to at least two surveys.

Practice Tip #6: If you and your firm are among the 75% of those polled who claim only some knowledge on sustainable design, it is dangerous to contract for specialized LEED® certification services. Until you are sufficiently knowledgeable to counsel a client on sustainable design or on LEED® certification, it may be best to retain a consultant to deal with that part of the project, just as you would any other specialty.

¹⁰ *AIA Members Strive to Be “Legally and Ethically” Green*, AIArchitect, Jan. 11, 2008.

¹¹ *Webinar on AIA’s New B101 Owner-Architect Agreement*, St. Paul/Travelers, Jan. 15, 2008.

D. Green Marketing Risks.

With “green architecture” all the rage, and with owners wanting a LEED® Silver or LEED® Gold plaque hanging in their lobby, architects and engineers may be tempted to pump up their firm’s experience in sustainable design in order to be hired. Brochures will list the number of LEED® Accredited Professionals in the firm, the number of LEED® Certified projects, awards won, etc. An architect’s marketing staff need to be cautioned 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? And what is the legal result when you do?

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 results. For example, in a 1984 Kansas case, the court held an owner who contracts with an architect or an engineer has a right to expect “an exact result” based on an oral representation to the client that a specific result would be achieved. Worse yet, although the owner’s claim against its design professional was barred under the 2-year statute of limitations for negligence, it was not barred under the 3-year period required for claims based on an oral contract. As a result, the case was allowed to proceed.¹²

Any more than an architect can guarantee that a skylight won’t leak or that concrete won’t crack, an architect or engineer should tie any representations as to LEED® levels to the use of “reasonable care to achieve” that level. The failure to obtain the minimum 26 credits makes the difference between obtaining LEED® certification and having no certification at all. Even a statement that the architect will use its “best efforts” to obtain certification at a certain LEED® level 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 Code of Ethics has several rules aimed at keeping marketing lingo in check. For example, Rule 4.201 says that,

¹² *Tamarac Development Company, Inc. v. Delamater, Freund & Assoc., P.A.*, 675 P.2d 361 (Kan. 1984).

“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.”

Could an architect be disciplined for misleading a client into thinking the project will qualify as LEED® Silver or Gold? The companion AIA ethical Rule 3.301 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 from “puffing” and over-selling the results that might be expected from use of that architect’s services. Even LEED® Accredited Professionals need to be honest and not mislead clients about results that can be achieved.

Practice Tip #7: Warn the marketers and principals in your firm about making any written or oral promises about specific LEED® certification levels that your design will achieve. State these levels as goals that you will use reasonable care and skill to achieve, but that due to the many circumstances beyond the Architect’s control, you cannot warrant or guarantee any specific result.

Practice Tip #8: Do not intentionally or recklessly mislead existing or prospective clients about the results that can be achieved through the use of your services. LEED® Accreditation of any individuals only means that person has been trained and tested over sustainable design principles and LEED® processes; but it is no guarantee that a specific level of certification can be achieved.

E. Green Legislation.

As of December 31, 2007, there are at least sixty-seven statutes or executive orders passed in twenty-eight states, plus dozens more pending in the various state legislatures which promoted green design. 375 mayors of large and small cities from all fifty 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. See **Appendix A**.

These laws range from tax incentives for building owners who incorporate energy saving principles into their structures, to sustainable design considerations for new and renovated construction projects, with most mandating certain minimum LEED® certification levels. Take for example Hawaii: Recognizing that LEED® certification is an important catalyst for bringing environmentally responsible and sustainable design into the mainstream, the Hawaii legislature passed a statute allowing for an expedited permitting process for buildings seeking LEED® certification.¹³ This type of incentive may lead developers to include sustainable design in order to stay on schedule.

In addition, there have been several Federal laws passed and even more are currently pending before Congress.¹⁴ Among the bills pending before Congress in 2008 is H.R. 3221 entitled the "New Direction for Energy Independence, National Security, and Consumer Protection Act." As can be seen from the title, this bill has a little bit of something in it for everyone . . . including sustainable design regulations. If passed, this wide ranging bill would, among other things, require the Secretary of Energy to issue regulations *prohibiting* the sale of 100 watt general service incandescent lamps after January 1, 2012, unless they emit at least 60 lumens per watt, require 15% of energy produced by retail electrical suppliers to be generated from renewable energy sources by 2020, and require Federal agencies to purchase light or medium-duty passenger vehicles that have been designated by the Environmental Protection Agency (EPA) as low greenhouse-gas emitting vehicles.

¹³ HAW. REV. STAT. § 46-19.6.

¹⁴ Just a few of the bills currently pending for debate before Congress as of February 1, 2008, include: *Energy Independence and Security Act of 2007*, H.R. 6, 110th Cong.; *To provide for the establishment of the Advanced Research Projects Agency-Energy*, H.R. 364, 110th Cong.; *Advanced Geothermal Energy Research and Development Act of 2007*, H.R. 2304, 110th Cong.; *Marine Renewable Energy Research and Development Act of 2007*, H.R. 2313, 110th Cong.; *Energy Policy Reform and Revitalization Act of 2007*, H.R. 2337, 110th Cong.; *Small Energy Efficient Businesses Act*, H.R. 2389, 110th Cong.; *International Climate Cooperation Reengagement Act of 2007*, H.R. 2420, 110th Cong.; *Carbon-Neutral Government Act of 2007*, H.R. 2635, 110th Cong.; *Transportation Energy Security and Climate Change Mitigation Act of 2007*, H.R. 2701, 110th Cong.; *Biofuels Research and Development Enhancement Act*, H.R. 2773, 110th Cong.; *Solar Energy Research and Advancement Act of 2007*, H.R. 2774, 110th Cong.; *Renewable Energy and Energy Conservation Tax Act of 2007*, H.R. 2776, 110th Cong.; *Green Jobs Act of 2007*, H.R. 2847, 110th Cong.; *New Direction for Energy Independence, National Security, and Consumer Protection Act*, H.R. 3220, 110th Cong.

The bad news is that with the growing popularity of sustainable design and "green legislation" being passed by the federal government, states and cities across the country, it is nearly impossible for an architect (*let alone a lawyer*) to keep abreast of the changing laws affecting their projects. But, as they say, "Ignorance of the law is no excuse," and the failure to comply with a statute or regulation out of ignorance can result in liability.

F. Negligence Per Se.

Architects, engineers and land surveyors (design professionals) are required by law to perform their services in a manner consistent with the way other professionals would in the same situation, or, as discussed above, i.e. the "professional standard of care." Although normally a court will require expert testimony to establish that standard, there are *two types* of negligence where expert testimony is not required to establish the standard of care. The *first* is the "common knowledge" exception where the negligence is so obvious that the jury does not need an expert to tell them that conduct fell below the standard of care. The *second* exception involves situations where the design is regulated by a statute or ordinance. The written law itself establishes the standard of care and expert testimony is not required. This latter exception is called "*negligence per se.*"

An example of how this may relate to sustainable design can be found by looking at one of the recently enacted sustainable design laws. Washington D.C. Code Section 6-1451.03 provides that for all new construction or substantial improvements of a non-residential privately owned project with over 50,000 square feet of gross floor area shall, within two years of receipt of a certificate of occupancy, meet or exceed LEED® Silver certification level. Therefore, because this requirement is a statutory requirement, if an architect fails to meet the LEED® Silver certification level, and if the owner is thereby damaged by the architect's failure to meet the certification level, he or she could, in some states, be found liable for "negligence per se."

What happens if an architect'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.¹⁵ 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.”¹⁶ In other states, however, the violation of a building code is merely “evidence” of negligence, to be considered along with other evidence, such as expert testimony.¹⁷

Some states are strict followers of the negligence per se doctrine. In one Washington State 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.”¹⁸ 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, another judge observed, “The finding of negligence is normally a task for the trier of fact [i.e. the jury]. 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.”¹⁹ In other words, when the statute or ordinance 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!

¹⁵ 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).

¹⁶ *Pierce v. ALSC Architects, P.S.*, 890 P.2d 1254, 1258 (Mont. 1995).

¹⁷ 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.”)

¹⁸ *Bauman by Chapman v. Crawford*, 704 P.2d 1181, 1184 (Wash. 1985).

¹⁹ *Id.*, at p. 1187.

While no comprehensive survey was done for this White 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.²⁰ 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.²¹

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.

Practice Tip #9: Have your attorney research the state law in which your project is located, certainly in your home state. Find out if yours is a strict follower of the negligence per se doctrine, or if a building code ordinance violation is merely evidence of negligence. Become familiar with the applicable statutes, ordinances and resolutions that impact on your project. Perhaps consider a contract clause in which you and the client agree that laws are subject to interpretation and judgment and, therefore, neither side will claim that the violation of any federal, state or local law is negligence per se.

G. 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

²⁰ *Id.*, at pp. 1187-88.

²¹ *The Queen v. Saskatchewan Wheat Pool*, 143 D.L.R.3d 9 (1983); *see 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).

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.

Practice Tip #10: Do not delete the waiver of consequential damages clause in the AIA contracts. For non-AIA contracts, insert a waiver of consequential damages. Contact a lawyer knowledgeable in your state to draft a waiver that is most likely to be upheld in your State.

H. 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 (TSE) a joint program begun in 1994 between the EPA's Office of Research and Development and the National Science Foundation (NSF) to fund environmental research into green design and sustainable products. 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 is selected or a system with an eye toward LEED® points, it may not fulfill the Owner’s long-term needs in terms of building performance

and maintenance. In those cases, the architect and engineer is a likely target for claims. So what's a design professional to do when it desires to use a new product?

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, 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 under-going 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."²² 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 the 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."²³

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, if applicable, 3) that the proposed use of such material or system is untested with this architect and, therefore, experimental.

Practice Tip #11: Obtain 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. See **Appendix C** for a sample form for obtaining informed consent from a client. The form may need to be modified to meet the law in your state, so seek the advice of competent legal counsel.

²² *Shadrick v. Coker*, 963 S.W.2d 726, 732 (Tenn. 1998).

²³ *Id.*

I. Failure to Timely Appeal.

What if your LEED® application is denied for certification, or denied at the level your client expected? Under the USGBC procedural rules there is a narrow window to file an appeal. Upon delivery of the Final LEED® Review, the project team has twenty-five (25) *business* days to accept or appeal the rating. If an appeal is not filed within that time frame, USGBC rules state that the project team, “will not have the opportunity to appeal.” Architects who are hired to shepherd their client’s project through the LEED® certification process need to be aware of the time for filing an appeal. If the time lapses due to inadvertence or neglect by the architect, and the appeal is not filed, there may be a very unhappy client. The client may demand for a refund of all the architectural and application fees it paid, plus the added construction cost of “green” products or systems that was spent on the anticipation of LEED® certification. Be certain that someone in the office keeps track of the appeal time from the date the Final LEED® Review is received.

Practice Tip #12: Just like a shop drawing log, keep track of the date(s) that all LEED® submittals and applications are filed and received. If the project is not certified, or not certified at the LEED® level sought, be sure to keep close track of the appeal time and warn the client in writing about the deadline to file an appeal, and that failure to timely file will result in a waiver of the right to appeal.

IV. CONCLUSION

Leave it to the lawyers to pour cold water on a great idea, but there is risk in anything an architect 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! 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.