

What You Should Know About Sustainable Development Projects



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"In the long term, the economy and the environment are the same thing. If it's unenvironmental it is uneconomical. That is the rule of nature." —Mollie Beattie

THE MAJOR environmental problems that the world is facing—climate change, deforestation, loss of biodiversity, and generally unsustainable natural resource consumption—directly impact our ability to develop our economies while simultaneously sustaining the health of people, plants, and animals. On a personal level, this is clearly reflected in the rapidly rising consumer prices generally and transportation specifically. Despite fluctuations in gas prices, personal transportation is economically unsustainable for many people. These same economic issues are impacting the construction and development sector. In response, the building industry is exploring ways to make our built environment as efficient as possible. "High performance green buildings" are facilities designed, built, operated, renovated, and disposed of using ecological principles for the purpose of promoting occupant health and resource efficiency while minimizing impact on the natural environment. Charles J. Kibert, *Green Buildings: An Overview of Progress*, 19 J. Land Use & Environment Law 491-492 (2004).

The green building movement in the United States has a well-deserved reputation for being the most successful element of the modern environmental movement. Al-

though many environmental gains have been rolled back during this first decade of the 21st Century, the green building movement is growing at an exponential pace. Several hundred million square feet of commercial/institutional buildings have been designed and built to obtain green building certification through a third-party certification such as the U.S. Green Building Council (USGBC) (www.usgbc.org), Green Globes (www.greenglobes.com), or Energy Star (www.energystar.gov). Certifying a project requires the registration of the project with the certifying organization and lining up the appropriate professional to credential the building who will ensure that all the required information is collected and retained for the certification. In the residential construction sector, thousands of homes are being built to green specifications and rated or certified by a variety of state and local green building organizations. There is high utilization of national certification programs for commercial, mixed use, institutional, and high rise residential buildings, and of local, decentralized certification programs for family housing and land development. This may change in the future as USGBC considers adopting regional standards to more closely identify with area ecological issues and climate conditions.

The green building movement is fundamentally successful due to buy-in from both the commercial and residential sectors. USGBC has been particularly successful in collaborating with owners, designers, builders, and the broad materials industry to support this movement. By developing a sound business model that clearly indicates the win-win potential of green building, in which additional design effort and improved construction practices translate to buildings with clear financial advantage, the USGBC has paved the way for other successful collaborations with industry to achieve environmental objectives. As with all construction projects, defining the roles and responsibilities of each member of the construction team throughout the project from its inception to its occupancy is critically

important to a successful project. The incorporation of sustainability principles into certain of The American Institute of Architects' (AIA) standardized documents marked a substantial milestone in the evolution of the green building movement. Just as the identification of the roles and responsibilities of the construction team are vital to a project initially and through the construction stage, the role of the tenant and landlord are just as important as the rapidly growing trend of green leasing works its way into mainstream commercial leasing.

The first part of this article outlines the roles and responsibilities of the construction team as identified in new AIA form documents, and the hidden liabilities that are emerging as a result of the green building boom. The second part of this article addresses drafting considerations for new residential communities with sustainable development elements, methods of dealing with existing covenants that prohibit sustainability-oriented activities, and leasing considerations for green projects.

CONSTRUCTION CONTRACTING FOR GREEN BUILDINGS

• The pervasiveness of sustainable development and green building concepts are validated as having staying power by the integration of these principles into the Standard Form of Agreement between Owner and Architect, AIA Document B101 – 2007 (“Form B101”). The AIA publishes over 100 contract document forms, including contracts for contractors, subcontractors, architects, and consultants, which are acknowledged as the industry standard. *See*, About AIA Contract Documents, at http://www.aia.org/docs_about&defPr=1.

Form B101 now requires the architect to discuss alternative approaches to the project's design and construction, including the feasibility of incorporating environmentally responsible design principles. *Schematic Design Phase Services*, §3.2.3 (AIA Document B101 – 2007). It should be noted that

the Form B101 makes this an affirmative contractual obligation on the part of the architect. Additionally, Form B101 requires the architect to consider “environmentally responsible design alternatives,” while contemplating the project and the owner’s budgeted costs. *Id.* at §3.2.5.1 (AIA Document B101 – 2007). Also notable in Form B101 is the addition of several related services to the list of Additional Services that may be provided by the architect with respect to a project. Specifically, LEED Certification, Commissioning, extensive environmentally responsible design, and historic preservation have been added to the list as optional Additional Services that the owner may request the architect provide outside of the Basic Services detailed in Form B101. *Id.* at §§4.1.22 – 4.1.24 and §4.1.26 (AIA Document B101 – 2007).

In connection with the addition of LEED certification into incorporation of these design principles into construction projects, the AIA also introduced Standard Form of Architect’s Services: LEED Certification, AIA Document B214 – 2007 (“Form B214”), which modifies or is incorporated into the Owner-Architect Agreement. Form B214 details the procedure to be followed by the architect in order to obtain LEED certification for the project from the predesign workshop with the owner, its consultants and the architect’s consultants through the preparation of the LEED Certification Plan and certification services through the contract administration stages, to the preparation of the final LEED Certification Report.

HIDDEN LIABILITY ISSUES LURKING IN GREEN BUILDING • Although demand grows for green building, simultaneously anxiety is growing among insurance underwriters and professionals concerned with the liability issues that have begun to surface in connection with these projects. There are a variety of claims that can arise against building professionals with respect to these projects: failure to achieve the desired certification level,

specified products with an unproven track record that end up having undesirable impacts on performance, or even structural issues. *See*, Gary J. Tulacz, *Insurers Worry About Green-Building Risks*, Engineering News-Record, July 9, 2008, <http://enr.construction.com/news/finance/archives/080709a.asp>. Building professionals must be careful to work within their technical expertise and hire specialists as needed just like they would on any other design or construction project.

Although some insurers have introduced specific insurance products relating to the green buildings themselves, insurers are hesitant to expose themselves to the unknown liability that could result from these types of negligence claims. If a project fails to meet its LEED certification designations, such a failure could have far-reaching consequences including the loss of tax incentives granted to the project and premiums built into the building’s leasing fees. *Id.* Claims may also result from delays in construction as a result of a new product’s unavailability. *Id.* As a general rule, both professional liability and commercial general liability policies expressly exclude from coverage any claim based upon or arising from warranties and guarantees. This type of exclusion may arise in the green building context in which a contractor or other professional agrees to provide a specified green certification. By contracting to achieve a result without the benefit of a qualification, that professional has created a guarantee and, thereby, subjects itself to an uninsured risk. Furthermore, because recent laws that mandate the incorporation of sustainability concepts into construction are so new, it remains to be seen what will occur in the industry once the first major case assessing these issues is decided. Until that time, the feel-good exercise of incorporating sustainability concepts into green building projects must be balanced with the contractual and professional risks and responsibilities of the parties under the development contracts.

Lawyers drafting design and construction contracts should inquire specifically about the nature of the sustainable design elements of a project so that risk is allocated properly for experimental elements and that certification promises are clearly documented with responsibility for necessary data collection and reporting allocated up front. In addition, if a building will require special expertise—for example, a structural engineer to design the building to support a green roof—the contract should provide for that type of specialist to be required. You may even want to negotiate the penalties for delays in the certification process, or for achieving lower certification levels than desired by the owner up front so there is no protracted dispute later about the value of a silver LEED certification versus platinum certification.

NEW CONSTRUCTION • If a developer creates a sustainable development using green building construction methods and complies with the myriad requirements for independent third-party certification, arguably that hard work should not be easily eradicated when ownership or control is transferred to a less knowledgeable or less environmentally friendly owner. Therefore, it is essential that attorneys drafting community documents be aware of the special attributes of sustainable development communities so that these projects will be effectively maintained in the long term.

Although true in any setting, it is particularly important in a residential setting due to the residents' natural desire to be autonomous and self-determining despite the original intent of use restrictions imposed for the project by the developer. Residents often want to undo or ignore important use restrictions in order to minimize maintenance activities and thereby save monthly association costs and expenses; unfortunately, this is often a shortsighted reaction as it undermines environmental friendliness and property values in the long term.

CCRs Sections Commonly Affected By Sustainable Development

Covenants, conditions, and restrictions (CCRs) are recorded in the public records where the property is located so that subsequent owners will have notice of community use restrictions when acquiring title in a deed-restricted community. CCRs inform an owner in a particular community of acts they are obligated to do as an owner (such as the obligation to pay assessments, etc.) and things they cannot do as an owner (such as creating a nuisance like planting exotic species in their yards), as well as often prescribing duties and obligations imposed upon an owners association for maintenance and community oversight.

Design Guidelines

Many communities have architectural/design committees that approve new construction and renovations in a community. In a green community, it is important for the developer to draft comprehensive initial design guidelines that incorporate the community visual aesthetic as well as other considerations, such as building orientation (for optimal thermal performance), stormwater flow, use of impervious materials, coordination with community habitat and stormwater systems, landscaping plans (for plant selection and irrigation systems) and community strategies for energy saving or energy generation. The developer's counsel should consult with the architect, landscape architect, and other related professionals about specific guidelines required for a particular sustainable development.

In addition, it is important to be sensitive to the potential for changing conditions when referencing third-party requirements for certification. For example, if the design guidelines specify Leadership in Energy and Environmental Design (LEED) for Homes certification v. 1 and five years later LEED for Homes is actually on v. 2.3, it may be impossible for a new home to comply. Similarly, what if LEED for Homes ceases to exist? Therefore, it may

be better to reference the current version of an independent third-party verified green building system to set the benchmark, with automatic updating for new versions, with an allowance for an alternate system of equal stringency in the event the standard ceases to exist. For example, the following provision is a method for addressing potential changing conditions for a development utilizing LEED for Homes: “LEED For Homes v.1.0, or if such version is no longer in existence or has been subsumed by a new version, then the latest applicable version shall serve as the standard, or if no LEED For Homes standard remains in existence, then the association shall be required to utilize a standard which employs requirements no less stringent than the original standards required under these covenants, and the association shall be obligated and mandated to impose such standards, unless these covenants have been otherwise amended to the contrary.”

Community Area Maintenance

Hopefully, the developer will clearly document the special design and engineering aspects of the community so that when control of the owners association is transferred to the non-developer owners, they will be able to maintain the property in the manner in which it was designed. One way for the developer attorney to assist with this process is to review the proposed development characteristics that will be certified by a third party in addition to the standard review of the development approvals issued by the applicable governmental agencies. The proposed certification documents will outline the special development characteristics and can serve as a launching pad for discussion with the project consultants about unique attributes that need to be documented for the owners association to succeed in maintaining a sustainable development.

Owner-Maintained Areas

An overarching issue is whether owners will control their own landscaping (plant selection and

irrigation) and lighting. If the community was designed with native plants and efficient irrigation, the developer likely sought to ensure that this landscaping plan is maintained in the future and to prevent an owner’s action from affecting or altering the community-wide plan in any significant manner. For example, if an owner moves in and misses the Brazilian Pepper (*Schinus terebinthifolius*) plant he or she had at his or her previous home and proceeds to plant one in the backyard, it is very likely that this exotic species will “escape” the bounds of the owner’s lot into community areas and adjoining lots. This will result in the owners association having to pay for eradication of an exotic plant from the community. There may be governmental laws and regulations to deal with exotic plant species, but it may be a good idea to specifically enumerate what plants are allowed and, more importantly, what plants are prohibited, in the community and to think about the best means for communicating to the owner what is allowed and prohibited. In addition, it is necessary to clearly enumerate the penalties to be imposed for violating these types of deed restrictions, which actions constitute a nuisance to the community structure.

Low-Impact Development

Traditional stormwater control depends on heavily engineered systems consisting of collection of run-off water from impervious surfaces through pipes and related infrastructure into storage basins or water bodies, without much attention to water quality. There exists a movement to design for enhanced community stormwater management and water quality by allowing stormwater to percolate in place using biophysical characteristics of a property. These developments are often referred to as Low Impact Developments (LID). A common LID technique is to combine swales with green roofs, pervious roads and sidewalks, and other similar green development features and characteristics. The appropriate LID technique for a specific com-

munity will depend upon the site-specific characteristics of the community and any special ecological needs. Since most local governments or applicable regulatory agencies adopted their stormwater guidelines long ago and have not undertaken action to update their requirements, LID often is not permitted without approval of a variance from traditional stormwater requirements. Since LID is a relatively new concept, it will be necessary to provide detailed guidelines to the owners association and owners about the operation and maintenance requirements for the system.

LID have special needs from a documentation perspective to avoid future legal issues about stormwater runoff and transferal of stormwater, especially in light of governmental laws and regulations relating to responsibility for stormwater impacts. Accordingly, proper easements for waterflow through and across the community will need to be included in the CCRs or in a stand-alone easement instrument. Maintenance responsibilities will need to be clearly delineated and incorporated in the CCRs. Any special requirements for pervious surfaces (and potential prohibition about the installation of impervious surfaces) should be incorporated into the community design guidelines.

For example, if the stormwater calculations for a community relied on all roofs being “green roofs,” it will be important to contain a restriction that in the event a roof needs to be replaced, it must be replaced with a similar roof with pervious characteristics. This is an example where it may be more important to provide performance guidelines (i.e., no roof may generate runoff in excess of x gallons during a 100-year storm event) than to specify how an owner is to specifically replace his or her roof, since it is likely that the appropriate technology when the CCRs were drafted may be obsolete 10 years later.

Renewable Energy Generation

More developers are taking steps to make their communities power generating through installation of renewable energy generating equipment, and some are even attempting to design net-zero-energy communities. Some communities have shared renewable power generation with wind turbines or large photovoltaic solar arrays. In these types of communities, it will be required to clearly delineate operational and maintenance responsibilities and to ensure that the appropriate use restrictions are in place to ensure continued operation of the equipment. Other communities employ individual-owner-driven requirements such as installation of solar water heaters on each home. In these types of communities, it will largely be an owner responsibility and the owners association will likely not have much involvement with developer-installed renewable power generation equipment. However, the developer should consider including design guidelines consistent with governmental laws and regulations about installation and placement of renewable power generating equipment. It may be necessary to consider developing site orientation and community landscaping guidelines consistent with the needs of the renewable power generating equipment. In addition, it is likely that additional legislation and regulatory directives will continue to emerge to protect owner investment in renewable power generating equipment such as by prohibiting neighbors from blocking solar collecting devices by allowing trees to grow or erecting infrastructure.

In any community that has renewable power-generating features, there will need to be clear disclosures about the party that will reap the benefits from the renewable power generating equipment. From a financial perspective, there are usually four components to delineate:

- The party that owns the renewable power generating equipment;

- The party responsible for operating and maintaining the renewable power generating equipment;
- The party that will reap the benefits from the power generated; and
- The party that will retain the renewable energy credits that are generated.

State laws and agencies regulating utilities will often provide the structure for the answer to these questions. However, the developer's attorney will also need to understand this information in order to accurately disclose such information to purchasers. Clearly, this is an area of rapid change, so counsel should be sure to carefully review related governmental laws and regulations on point.

EXISTING COMMUNITIES • There have been numerous articles in newspapers and legal journals about owners in deed-restricted communities being prohibited from taking energy saving actions, harvesting rainwater and installing renewable power generating devices. This is usually the result of owners failing to recognize that the CCRs contain provisions that govern the community and their desired activities. As an example, there have been situations in which owners who have decided to dry their clothes on a clothesline rather than in a dryer have not considered that the CCRs contained prohibitions against clotheslines. Unfortunately, many communities prohibit hanging clothes outside of the home. For many owners, it is important to them that their community be aesthetically pleasing, and that means that they do not want to live somewhere that people hang their clothes out to dry. This can create quite a conflict between community associations and residents seeking to decrease their environmental footprint. Such conflicts have indeed arisen throughout the country, and several states have already taken, or are considering taking, legislative action to ensure that residents can air dry their laundry. *See*, Chris-

tine Woodside, *Drawing a Line on Outdoor Clothes Drying*, N.Y. Times, Dec, 2, 2007, <http://www.nytimes.com/2007/12/02/nyregion/nyregionspecial2/02clothesline.html>; Jenna Russell, *Clothesline Rule Creates Flap*, The Boston Globe, March 13, 2008 http://www.boston.com/news/local/articles/2008/03/13/clothesline_rule_creates_flap/. Florida is one such state that has passed "Right to Dry" legislation. Florida Statute section 163.04(2) ensures that residents can use clotheslines despite any CCRs stating otherwise. It is difficult to balance the competing interests of aesthetics and efficiency, but this should be considered carefully in order to reach long-term compromise.

In addition, many communities have deed restrictions prohibiting the placement of energy generating devices, such as wind turbines and solar collectors, in the community. What about the owner who wants to heat a swimming pool using a solar water heater? In some situations there may be state or local laws that trump deed restrictions and allow owners to install these types of devices. For example, Florida Statute section 163.04 allows the installation of certain renewable energy generating devices despite any restriction to the contrary:

"(2) No deed restrictions, covenants, or similar binding agreements running with the land shall prohibit or have the effect of prohibiting solar collectors, clotheslines, or other energy devices based on renewable resources from being installed on buildings erected on the lots or parcels covered by the deed restrictions, covenants, or binding agreements. A property owner may not be denied permission to install solar collectors or other energy devices based on renewable resources by any entity granted the power or right in any deed restriction, covenant, or similar binding agreement to approve, forbid, control, or direct alteration of property with respect to residential dwellings not exceeding three stories in height. For purposes of this subsection, such entity may determine the specific location

where solar collectors may be installed on the roof within an orientation to the south or within 45 degrees east or west of due south provided that such determination does not impair the effective operation of the solar collectors.”

Another example that frequently emerges as an area of contention is landscaping. One example is when an owner who is tired of replacing continually dying grass because of governmental watering restrictions elects to “carpet” his or her lawn with synthetic grass. In the owner’s opinion, the synthetic surface complies with the requirement in the CCRs to have a green lawn at all times. Clearly, the intent of such a provision was that natural grass would be required, but one can easily understand how expensive it can be to attempt to maintain a natural lawn when watering is not permitted. Therefore, it is important to review the community landscaping provisions and determine whether the restrictions are appropriate for the particular community. In addition, as with solar collection devices, there may be applicable governmental laws and regulations that trump deed restrictions. For example, Florida Statute section 720.3075(4) prohibits the enforcement of anti-xeriscaping or native plant restrictions on a subdivided lot:

“Homeowners’ association documents, including declarations of covenants, articles of incorporation, or bylaws, entered after October 1, 2001, may not prohibit any property owner from implementing Xeriscape or Florida-friendly landscape, as defined in s. 373.185(1), on his or her land.”

A savvy association lawyer will remain aware of emerging trends that could impact the communities they represent and will determine when it is appropriate to revise the CCRs to be consistent with community standards, or to be in line with the evolving trends in the particular portion of the city, state, or country where the community is located. It is important that developer’s counsel research any

of these types of statutory provisions to determine what is allowed by current law but which is prohibited by the CCRs. Following such analysis, it may be an appropriate time to revise the documents to be compliant with applicable laws and regulations, as such revisions will clarify what is or is not allowed in the community. There is nothing more confusing to the board of directors of the owners association or an owner than to read that a particular action or activity is explicitly prohibited in the CCRs but is allowed by local law. It is often difficult to interpret such conflicts, and it is much more cost-effective to resolve these issues at the start.

GREEN LEASING • Although green building concepts are being integrated into residential communities, they are simultaneously working their way into commercial and industrial buildings. The traditional commercial lease is not designed to address the unique design and operational concerns of green buildings. In fact, few leases today offer either the tenant or the landlord a method of requiring the other party to be accountable for energy efficient practices and other sustainable features. Matt Hudgins, *Green Leases: A Matter for Debate*, National Real Estate Investor, May 5, 2008, http://nreionline.com/brokernews/greenbuildingnews/green_leases_matter_debate_0505/. It is of critical importance that the parties involved in the leasing of space in a green building consider how the lease documentation will deal with these characteristics and define the rights and responsibilities of the parties involved.

Sustainability may not be the focus of both landlord and tenant but the properly negotiated lease provides a mechanism for a party to address these concerns. From a landlord’s perspective, if the USGBC revises the LEED standards such that certified buildings must periodically renew their certifications, the green lease will be crucial for insuring that a tenant does not hinder the building’s performance and prevent it from being able

to maintain its LEED designation. *Id.* For example, the landlord may require specific energy use procedures be adopted by a tenant or that the tenant use low VOC paints and carpeting made primarily from recycled materials. Conversely, if the tenant is concerned with sustainable practices, the tenant may utilize the lease to require the landlord to utilize environmentally preferable construction materials, to minimize the creation of solid waste and install energy-efficient lighting.

The Building Owners and Managers Association (BOMA) International has worked for the past several years identifying issues serving as barriers to the incorporation of energy-efficient technologies and sustainability principles in the commercial, multi-tenant arena. Karen Penafiel, *BOMA "Greens" Lease Guidelines*, 2008 Green Real Estate Guide, April 8, 2008, <http://www.sustainableindustries.com/commentary/17369284.html>. The result of these efforts will be BOMA's *The Guide to Writing a Commercial Real Estate Lease*, in which BOMA has reviewed a standard lease agreement and provides suggestions for addressing the barriers commonly cited to implementing green building practices. The guide was released earlier this summer and provides sample language to assist landlords and tenants in maintaining a green building through operations and management practices and is designed to serve as an educational tool for both prospective tenants and brokers about what tenancy in a green building entails and the responsibilities of the parties involved. *Id.*

A green lease needs to address a variety of factors to ensure that it is encouraging green building principles. A building-wide recycling program must be implemented and addressed through the building's rules and regulations. Additionally, the accept-

able methods, materials, and procedures used for cleaning the building should be detailed. The materials and construction practices to be used by the tenant in building out its space must also be specified in accordance with the building's sustainability program. Furthermore, an educational guide should be provided to the tenant that describes in detail the building's green features and how each of them can be used by the tenant to maximize the tenant's and the building's efficiency. Alan Whitson, *Green Lease*, Environmental Design + Construction, July 17, 2006, http://www.edcmag.com/Articles/Column/cc0c0b5ca1e7c010VgnVCM-100000f932a8c0_____.

As more and more landlords and tenants become drawn to the notion of sustainable building, the language in leases will be forced to evolve and follow the trend to minimize the carbon footprint of these commercial buildings and shift toward the sustainability mindset on the part of both the landlord and tenant. For sample green lease provisions and more information, visit the California Sustainability Alliance Green Leasing Toolkit page at http://www.sustainca.org/content/leasing_toolkit.

CONCLUSION • The green building movement has been a success for several reasons. It has been embraced by the building industry; it makes economic sense; and it holds out the very real promise of moving toward a cleaner, more sustainable world. For the attorney who knows about contracting for green building, the hidden liability issues, the CCRs typically affected, and other sustainable development issues, the future can be as bright as it will be green.

PRACTICE CHECKLIST FOR What You Should Know About Sustainable Development Projects

- Standard Form of Agreement between Owner and Architect, AIA Document B101 – 2007 (“Form B101”):
 - ___ Now requires the architect to discuss alternative approaches to the project’s design and construction, including the feasibility of incorporating environmentally responsible design principles and makes this an affirmative contractual obligation on the part of the architect. *Schematic Design Phase Services*, §3.2.3 (AIA Document B101 - 2007);
 - ___ Requires the architect to consider “environmentally responsible design alternatives,” while contemplating the project and the owner’s budgeted costs. *Id.* at §3.2.5.1 (AIA Document B101 – 2007);
 - ___ Lists “Additional Services” that may be provided by the architect with respect to a project, including LEED Certification, Commissioning, extensive environmentally responsible design, and historic preservation. The AIA also introduced Standard Form of Architect’s Services: LEED Certification, AIA Document B214 – 2007 (“Form B214”), which modifies or is incorporated into the Owner-Architect Agreement. Form B214 details the procedure to be followed by the architect in order to obtain LEED certification for the project from the predesign workshop with the owner, its consultants, and the architect’s consultants.

- Covenants, conditions, and restrictions (CCRs) are recorded in the public records where the property is located so that subsequent owners will have notice of community use restrictions when acquiring title in a deed restricted community. CCRs affected by green development include:
 - ___ Design guidelines;
 - ___ Common area maintenance; and
 - ___ Owner-maintained areas.

- There is a movement to design for enhanced community stormwater management and water quality by allowing stormwater to percolate in place using biophysical characteristics of a property. These developments are often referred to as Low Impact Developments (LID). A common LID technique is to combine swales with green roofs, pervious roads and sidewalks, and other similar green development features and characteristics.

- More developers are taking steps to make their communities power generating through installation of renewable energy generating equipment. Some communities have shared renewable power generation with wind turbines or large photovoltaic solar arrays. However, the developer should consider including design guidelines consistent with governmental laws and regulations about installation and placement of renewable power generating equipment.