



June 28, 2019

Houston, Texas

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- Types of Green Building Certifications
- Basics of LEED Certification
- Standards of Care
- Contractual Risks on LEED/Sustainable Projects
- Litigation involving Sustainable Projects
- Insurance coverage for green building projects

- **LEED: Leadership in Energy & Environmental Design**

Established in 1998, Leadership in Energy & Environmental Design (LEED) has transformed the way buildings and communities are designed, constructed, maintained and operated across the globe.

- **ENERGY STAR for Buildings**

ENERGY STAR was originally developed by the U.S. Environmental Protection Agency (EPA) as a voluntary labeling program to promote energy-efficient products and reduce greenhouse gas emissions.

- **Living Building Challenge**

The Living Building Challenge (LBC) is a philosophy, advocacy platform, and certification program that promotes a very high building standard linked to net zero energy, net zero water, beauty, and more.

- **WELL Building Standard**

The WELL Building Standard focuses on the health and wellness impacts that buildings have on occupants. Areas of concentration are air, water, nourishment, light, fitness, comfort, and mind.

- **Passivhaus**

The *Passivhaus* standard was developed in Germany in the early 1990s. The first dwellings to be completed to the Passivhaus Standard were constructed in Darmstadt in 1991.

- **BOMA 360 Performance Program**

The BOMA 360 Performance Program awards buildings that meet industry best practices in building management and operations. It includes the following prerequisites:

- A standard operating procedures manual
- A formal preventive maintenance program
- Completion of the most recent BOMA Experience Exchange Report survey
- Energy benchmarking using ENERGY STAR Portfolio Manager

- **Green Globes**

The Green Globes system was based on the Building Research Establishment's Environmental Assessment Method (BREEAM) by the Canadian Standards Association. The system, which is meant to be user-friendly even for those with no design experience, contains seven major green building areas with different weightings:

- Project management
- Site
- Energy
- Water
- Resources
- Emissions, effluents, and other impacts
- Indoor environment

- **ENERGY STAR for Homes**

ENERGY STAR certification was first offered for homes in 1995. Initially focused on windows, air sealing, heating, cooling, and ventilation, the ENERGY STAR label has since been updated to apply to more components of the home—including lighting, insulation, and appliances.

- **National Green Building Standard**

The National Association of Home Builders (NAHB) and the International Code Council (ICC) partnered to establish a nationally recognized standard definition of green building for homes

- LEED is the most widely used green building rating system in the world. It is applicable to almost any type of building at all phases of development, from new construction to existing buildings, and all building sectors, from homes to hospitals to corporate headquarters.

- What is the **LEED Rating System**?
 - Leadership in **E**nergy and **E**nvironmental **D**esign
 - Voluntary third-party rating system
 - Earn Credit Points for green building criteria
 - *MEASURES* success in meeting Sustainable goals
 - Holistic Integrated Design Approach to Building Design, Construction, and Operation
 - Quality Control Process for all Projects

USGBC has four levels of LEED:



© U.S. Green Building Council, 2008

The LEED rating systems are grouped into five main categories:

LEED Rating Systems

**Building Design
+ Construction**

Entire building new construction or major renovations

**Interior Design
+ Construction**

Interior fit-out of tenant spaces

**Operations +
Maintenance**

Entire existing buildings undergoing improvement with minor or no construction

Homes

New single-family homes, low-rise multi-family (1-3 stories), or mid-rise multi-family (4-6 stories)

**Neighborhood
Design**

New development or redevelopment projects with residential uses, nonresidential uses, or a mix.

- Latest LEED Version
 - LEED v4, launched in late 2013, is the most current version of LEED
 - As of October 31, 2016, it is the only version of the rating systems open for registration in LEEDOnline.
- See LEED Checklist on following slide.



LEED v4 for BD+C: New Construction and Major Renovation

Project Checklist

Project Name:

Date:

Y ? N

Y	?	N	Credit		
				Integrative Process	1
0 0 0 Location and Transportation 16					
			Credit	LEED for Neighborhood Development Location	16
			Credit	Sensitive Land Protection	1
			Credit	High Priority Site	2
			Credit	Surrounding Density and Diverse Uses	5
			Credit	Access to Quality Transit	5
			Credit	Bicycle Facilities	1
			Credit	Reduced Parking Footprint	1
			Credit	Green Vehicles	1
0 0 0 Sustainable Sites 10					
Y			Prereq	Construction Activity Pollution Prevention	Required
			Credit	Site Assessment	1
			Credit	Site Development - Protect or Restore Habitat	2
			Credit	Open Space	1
			Credit	Rainwater Management	3
			Credit	Heat Island Reduction	2
			Credit	Light Pollution Reduction	1
0 0 0 Water Efficiency 11					
Y			Prereq	Outdoor Water Use Reduction	Required
Y			Prereq	Indoor Water Use Reduction	Required
Y			Prereq	Building-Level Water Metering	Required
			Credit	Outdoor Water Use Reduction	2
			Credit	Indoor Water Use Reduction	6
			Credit	Cooling Tower Water Use	2
			Credit	Water Metering	1
0 0 0 Energy and Atmosphere 33					
Y			Prereq	Fundamental Commissioning and Verification	Required
Y			Prereq	Minimum Energy Performance	Required
Y			Prereq	Building-Level Energy Metering	Required
Y			Prereq	Fundamental Refrigerant Management	Required
			Credit	Enhanced Commissioning	6
			Credit	Optimize Energy Performance	18
			Credit	Advanced Energy Metering	1
			Credit	Demand Response	2
			Credit	Renewable Energy Production	3
			Credit	Enhanced Refrigerant Management	1
			Credit	Green Power and Carbon Offsets	2

0	0	0	Materials and Resources	13	
Y			Prereq	Storage and Collection of Recyclables	Required
Y			Prereq	Construction and Demolition Waste Management Planning	Required
			Credit	Building Life-Cycle Impact Reduction	5
			Credit	Building Product Disclosure and Optimization - Environmental Product Declarations	2
			Credit	Building Product Disclosure and Optimization - Sourcing of Raw Materials	2
			Credit	Building Product Disclosure and Optimization - Material Ingredients	2
			Credit	Construction and Demolition Waste Management	2

0	0	0	Indoor Environmental Quality	16	
Y			Prereq	Minimum Indoor Air Quality Performance	Required
Y			Prereq	Environmental Tobacco Smoke Control	Required
			Credit	Enhanced Indoor Air Quality Strategies	2
			Credit	Low-Emitting Materials	3
			Credit	Construction Indoor Air Quality Management Plan	1
			Credit	Indoor Air Quality Assessment	2
			Credit	Thermal Comfort	1
			Credit	Interior Lighting	2
			Credit	Daylight	3
			Credit	Quality Views	1
			Credit	Acoustic Performance	1

0	0	0	Innovation	6	
			Credit	Innovation	5
			Credit	LEED Accredited Professional	1

0	0	0	Regional Priority	4	
			Credit	Regional Priority: Specific Credit	1
			Credit	Regional Priority: Specific Credit	1
			Credit	Regional Priority: Specific Credit	1
			Credit	Regional Priority: Specific Credit	1

0	0	0	TOTALS	Possible Points: 110
Certified: 40 to 49 points, Silver: 50 to 59 points, Gold: 60 to 79 points, Platinum: 80 to 110				

- What is a “Standard of Care”?
 - It establishes the baseline of performance of professional services by an architect, engineer or other licensed design professional.
 - It can be established by common law or by contract.

- Sample Standard of Care clause:

The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

- If a design professional agrees by contract to perform LEED services, these services must be performed in accordance with the standard of care.

- Warranty Liability
- Clauses Making Payment Contingent on LEED Certification
- Poorly Defined LEED Scope of Work
- Flow Down Provisions

Warranty Liability

- Some contracts require design professional to warrant the Project will achieve LEED certification.

- So many factors beyond design professional's control in achieving LEED certification:
 - Poorly constructed
 - Owner-driven value engineering changes
 - On-line submission of documentation to USGBC

- Avoid LEED warranties if at all possible.

LEED Contingent Payment Clauses

- Some contracts include language making payment of final invoice/payment application contingent on achieving LEED certification.
- In many instances, LEED certification can occur well after Project is complete.
- Why should design professional bear risk of nonpayment over failure of Project to achieve LEED certification?

Poorly Defined LEED Scope of Work

- Many contracts fail to adequately address the complexities of achieving LEED certification.
- The AIA B214-2012 sets forth Architect's responsibilities for LEED certification.
- ConsensusDOCs 310 Green Building Addendum appends to Green Building Facilitator's Contract.

Poorly Defined LEED Scope of Work

- Contract should clearly define LEED responsibilities by LEED Credit Section through use of LEED Checklist.
- Owner's desired level of LEED certification should be established in contract, e.g., Gold, Silver, Platinum.
- Representations or warranties as to achievement of a certain level of certification should be avoided.

See AIA B214-2012

LEED “Flow-Down” Provisions - What is a “flow-down” provision?

- A provision from a prime contract that “flows down” to subcontractor obligations included in agreement with Owner/upstream party.
- Example – “Subcontractor assumes toward Contractor all obligations Contractor has assumed toward Owner under the Prime Contract.”
- If contractor has agreed to onerous LEED provisions in prime contract they can be passed down to subcontractor in flow down clause.
- Get a copy of prime contract if a “flow-down” clause exists in subcontract.

- There has not been much litigation involving green/LEED projects.
- This is due primarily to prevalence of arbitration clauses.

- 4 Categories:

- (1) Materials Litigation

- Chesapeake Bay Foundation Case (Maryland, 2011)

- (2) Sales Representation Litigation

- Riverhouse Condominium Case (New York, 2010)

- (3) Litigation for failure to obtain LEED Certification

- Bain Case (Illinois, 2010)
- Shaw Development Case (Maryland, 2007)

- (4) Administrative Type Actions

- Northland Pines High School (Wisconsin, 2008)

Chesapeake Bay Foundation Case (Maryland, 2011)

- First LEED Platinum building in US.
- CBF contracted with SmithGroup, Inc. to design the Philip Merrill Environmental Center, CBF's headquarters, on the Chesapeake Bay in Annapolis, Maryland.
- CBF also contracted with Clark Construction Group, LLC as general contractor to oversee the construction, which spanned from 1999 into 2000.
- SmithGroup's 'green' design called for exposed structural wood members (Parallams) outside the envelope of the Merrill Center, including some that penetrated the building's façade.

Chesapeake Bay Foundation Case (Maryland, 2011)

- 5 years after completion, CBF discovered:
 - Parallams had rotted and deteriorated
 - Parallams had not been treated with PolyClear 2000 as certified
 - PolyClear 2000 was not well suited for preserving the Parallams
 - Weyerhaeuser had knowingly given false assurances to the contrary.
- The parties reached a confidential settlement agreement so the ultimate outcome is unknown.

Chesapeake Bay Foundation Case (Maryland, 2011)

- TAKEAWAY - Specifying new or untried materials and products (that are often the keystone of sustainable building) comes with unique risks.

Riverhouse Condominium Case (New York, 2010)

- In May 2010, purchasers of units in a New York City condominium building filed a \$1.5 million lawsuit against project's developer and the building's manager.
- Riverhouse, a waterfront luxury condominium was advertised as a truly sustainable building (built to LEED-Gold standards) with range of environmental design features, such as photovoltaic solar panels, a geothermal heating and cooling system, and a stormwater collection system to irrigate building's landscaping and green roofs.

Riverhouse Condominium Case (New York, 2010)

- Plaintiffs argued they experienced many issues with building, such as cold drafts and insufficient heat in their units, and alleged building failed in several green respects — issues that were **“materially different from those represented by the project sponsor and its principals in the condominium offering plan.”**
- The litigation demonstrates very real threat of liability from “green-washing” in the context of green building.

Shaw Development Case (Maryland, 2007)

- Shaw filed a counter-complaint against Southern Builders in Somerset County, Maryland arising from, in part, the projects failure to achieve LEED Silver certification.
- Shaw Development alleged, among other things, that Southern Builders failed to construct the condominium project in a good and workmanlike fashion and, as a result, the project did not achieve USGBC LEED Silver certification.
- Issue pertained to construction contract language requiring compliance with particular LEED certification level. The project did not receive such certification and owner brought a \$635,000 damages claim against contractor resulting from the owner's inability to benefit from a Maryland tax credit.
- The case ultimately settled.
- TAKEAWAY – Even basic contract language can be used against you.

- Professional liability insurance policies (E&O policies) can provide coverage on LEED and green buildings.
- Coverage is typically afforded under the definition of “Professional Services” in the policy.

Sample definition of “Professional Services”

“Professional Services” means:

- A. services that you, or others for whom you are liable, are qualified to perform for others on behalf of a Named Insured, in the capacity of an architect, engineer, interior designer, landscape architect, land surveyor, **LEED consultant**, construction manager, or
- B. management of your sub-consultants in their capacity as architects, engineers, interior designers, landscape architects, land surveyors, **LEED consultants**, or construction managers.





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