

NAIOP

COMMERCIAL REAL ESTATE
DEVELOPMENT ASSOCIATION

Development '09

The Annual Meeting for
Commercial Real Estate

LEGAL IMPLICATIONS RELATED TO GREEN BUILDINGS

Presented by

Dale Dekker

Dekker/Perich/Sabatini

Albuquerque NM-Las Vegas NV-Amarillo TX



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DALE DEKKER DEKKER/PERICH/SABATINI

Dale has become an industry leader by bringing green building to a forefront in his community. His firm, Dekker/Perich/Sabatini has designed several green buildings that have received recognition from the United States Green Building Council (USGBC).

- Advent Solar, an 85,000 square foot manufacturing plant that was designed to achieve LEED Silver Certification from the USGBC
- Mesa Del Sol Fire station which was designed to achieve LEED Platinum Certification from the USGBC
- Jefferson Green, Dekker/Perich/Sabatini's 85,000 square foot corporate office headquarters which was honored with a double LEED Gold Certification for Interiors and Core and Shell from the United States Green Building Council. The design focused on incorporating meaningful sustainable features into a market-rate speculative office building in order to use 30% less water and 45% less energy than a typical local office building.

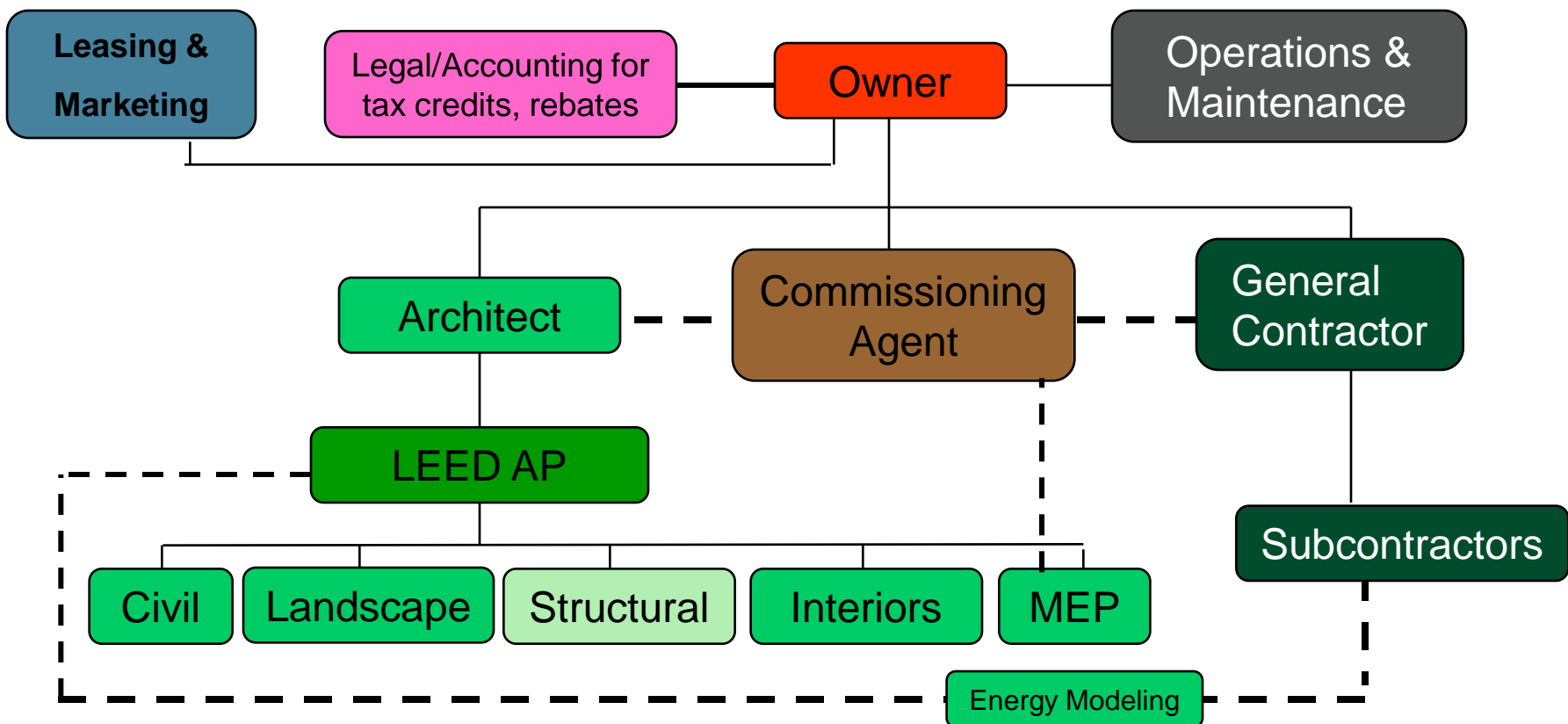
- Green building has been growing nationally
 - Every business day, \$464M in construction registers
 - 3.2 billion commercial sf = certified or registered
- Over 11,000 registered projects
- Over 1,400 certified projects
- About 75% under LEED-NC
- All 50 states and 69 countries
- Over 51,000 accredited professionals
 - Most without project experience



- **Team Composition**

- Who will manage the LEED effort?
- Who will the commissioning agent work for?
- Any need for specialty consultants?
 - Cisterns, daylight, acoustics, energy modeling
- Integrated design
 - Propose, evaluate, refine strategies
 - Brainstorming, charettes, reviews
 - Maximize benefits, minimize risks
- Experience matters
 - Material knowledge
 - Process support
 - Credit strategy overlaps

- **LEED needs to be integrated into the design process**
- Requires buy-in from entire team
- Can be accomplished with any delivery method (D/B, D-B-B, CMAR)



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Ben Davis, Attorney, LEED AP

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BEN DAVIS, LEED AP

- Ben Davis is an attorney with Atkinson & Thal PC in Albuquerque, New Mexico. Atkinson & Thal specializes in complex commercial litigation, business litigation and natural resources litigation. Davis is admitted to practice law in both Texas and New Mexico.

Ben Davis, Attorney, LEED, AP



- Litigation Associate with Atkinson, Thal & Baker, P.C.
- Second LEED AP attorney in New Mexico
- Appointed by Mayor Chavez to the City of Albuquerque's Climate Action Committee
- Represents a variety of commercial entities in commercial litigation

Shaw Development, LLC v. Southern Builders, Inc.



Shaw Development, LLC filed a countersuit against its contractor alleging (among other things) Southern Builders, Inc. breached their agreement (AIA 101-1997):

Specifically, the Project Manual and Scope of Work required Southern Builders to construct an environmentally sound “Green building,” in conformance with a “Silver Certification Level according to U.S. Green Building Council’s Leadership in Energy & Environmental Design (LEED) Rating Systems,” as more specifically set forth in the Project Manual and Project Specifications, Division I Section “LEED Requirements.”

Shaw sought damages of:

Six Hundred Thirty-Five Thousand Dollars (\$635,000.00) in tax credits for failing to construct the Project in conformance with a “Silver Certification Level according to U.S. Green Building Council’s Leadership in Energy & environment Design (LEED) Rating System.

Lessons:

- AIA 101-197 alone may not work for your project
- Limited Relief Sought:
 - Loss of reputation
 - Loss of mortgage discounts
 - Loss of tenants
 - Higher operational costs

The Air Conditioning, Heating and Refrigeration Institute *et al.* v. City of Albuquerque



The City of Albuquerque adopted a “green building code” which required any new construction, additions and alterations to existing buildings to meet a minimum 14.0 SEER rating for air conditioners (the Federal Standard is 13.0), a minimum 90% AFUE for gas furnaces (the Federal minimum is 78%), as well as a number of other requirements more stringent than the Federal standards adopted under the Energy Policy and Conservation Act (“EPCA”) and the Energy Policy Act of 1992, as well as ASHRAE Standard 90.1 (if adopted by the state or city).

A number of interested parties filed a lawsuit to determine if federal law preempted the City of Albuquerque’s “green code”. Federal District Judge Martha Vazquez agreed with the industry groups and enjoined the City of Albuquerque from enforcing the stricter HVAC standards. The Court held:

The City’s goals in enacting Albuquerque Energy Conservation Code and the Albuquerque High Performance Buildings Ordinance are laudable. Unfortunately, the drafters of the Code were unaware of the long-standing federal statutes governing the energy efficiency certain HVAC and water heating products and expressly preempting state regulation of these products when the Code was drafted and, as a result, the Code, as enacted, infringes on an area preempted by federal law.

The City argued that because there are alternative performance based standards such as “LEED Silver and Build Green New Mexico,” which do not require the use of any high efficiency products, then the higher efficiency standards were not preempted. The Court disagreed:

Plaintiffs have provided evidence that these performance-based alternatives, as a practical matter, cannot be met with products that meet, but do not exceed, the federal energy conservation standards.^[1] Furthermore, it is undisputed that if products at the federal efficiency standard are used, a building owner must make other modifications to the home to increase its energy efficiency in order to comply with the Code. Thus, in effect, there is a penalty imposed for selecting products that meet, but do not exceed, federal energy standards. A building code that effectively requires the installation of products that exceed federal energy standards cannot satisfy this provision. See, e.g., H.R. Rep. 100-11 at 26 (building code exception intended to “ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed ... the applicable Federal standard ...”)(emphasis added).

^[1] Defendant provided testimony from Stace McGee that it was possible to build or renovate a home to the LEED silver standard without using HVAC and water heating systems that exceed the federal energy standards. Mr. McGee’s testimony, however, is undermined by the fact that to date no a single home in New Mexico has been certified as LEED silver. Furthermore, Mr. McGee’s testimony did not establish that it was practical to build a home to LEED silver standards using only federally compliant HVAC and water heating products. To the contrary, Mr. McGee testified that he met LEED standards in his own home using federally compliant products by replacing the roof, installing additional insulation, and making other modifications.

Contact Information

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Paul D'Arelli, Esq.
Attorney

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PAUL D'ARELLI, ESQ.


- Paul D'Arelli, Esq. is a Shareholder with the law firm of Berger Singerman. He was the fifth attorney in the United States and the first in Florida to become a LEED® Accredited Professional by the U.S. Green Building Council. Mr. D'Arelli was previously Co-Chair of Greenberg Traurig's Green Building & Sustainability Group before joining Berger Singerman. He works with other firm attorneys across many disciplines to manage the host of legal and risk management issues inherent in the implementation of a green building strategy, from entitlements and incentives, to design and construction contracts, project governance, marketing, leasing, insurance and more. Paul has a Master of Laws degree from the University of Miami School of Law in Real Property Development and is also a licensed California general contractor and has prior experience as a builder.

What are Primary Risks for Owners/Developers?

1. Promoting certification or performance outcome and failing to achieve it




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Legal News. True Stories.



Home Page >> [Lawyer Interviews](#) >> Green Building Expectations get Red Flag..

Green Building Expectations get Red Flag from Attorney Donald Murano

September 22, 2008. By Brenda Craig 

St. Louis, MI: The Green revolution in the construction business may have unintentionally laid the foundation for a wall of lawsuits. Donald Murano, an attorney with years of experience in the building industry, predicts that energy efficient, eco-friendly construction projects that fail to live up to promises and expectations will be buried in a pile of litigation.

"Green buildings can be a beautiful thing if people don't oversell their wares," says Murano. "If you oversell and people start realizing there are quantifiable damages you can expect legal action."

**Excerpt taken from full article which can be found at <http://www.lawyersandsettlements.com/articles/11261/Don-Murano-lawyer-interview.html>*

- **Risk Management Strategy:**

- Don't promise what you can't assure delivery of unless you are prepared for the consequences
- No "puffing"
- Carefully drafted disclaimers in all documents
- Training for all sales and marketing professionals
- Protocol for review and approval of all marketing materials
- Carefully tailored leases
- Design, engineering, consulting and construction documents that clearly allocate responsibilities



2. Mistaken belief that certification is a proxy for performance

- ***New Buildings Institute Final Report, March 2008, “Energy Performance of LEED® for New Construction Buildings,”*** Cathy Turner and Mark Frankel, pp. 1-4.

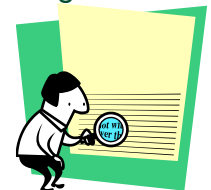
“Program-wide, energy modeling turns out to be a good predictor of *average* building energy performance for the sample. However, as with the other metrics in the study, there is wide scatter among the individual results that make up the average savings. Some buildings do much better than anticipated On the other hand, nearly an equal number are doing worse--sometimes much worse. . . . At the extreme, several buildings use more energy than the predicted code *baseline* modeling This shown degree of scatter suggests significant room for improvement in energy use prediction accuracy on an individual project basis.” (Emphasis added)

- ***Assessing Green Building Performance: A Post Occupancy Evaluation of 12 GSA Buildings, GSA Public Buildings Service, June 2008, p. 12,*** some interesting deviations in operation and maintenance costs were revealed:

“On average, the bottom quartile of the buildings studied had considerably higher costs than the industry baseline: 45% above the national average for US commercial buildings.” (Emphasis added)

- ***Documenting Performance: Does it Need to Be So Hard?, Adam W. Hinge, P.E. and Donald J. Winston, High Performance Buildings, Winter 2009, p. 21***

“Recently, we’ve even heard of a couple of projects where owners pay for two sets of energy models: one to get the most LEED credits, and another with more realistic assumptions about operating conditions for budgeting their real expected energy costs. If this sort of “gaming” grows, our current modeling and reward system is setting perverse incentives.”



- **Risk Management Strategy:**
 - Distinguish certification objectives from performance objectives - don't rely on the law of averages... (hope for best but draft for the worst)
 - Make sure the assumptions underlying the modeling are realistic based on proposed occupancy, etc.
 - Do not underestimate the importance of operations and maintenance – strong tenant guidelines; trained staff
 - Disclaimers

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TERENCE J. DELAHUNTY, JR., ESQ.
LEED AP
GRAYROBINSON, P.A.

- Terry Delahanty is a shareholder with the law firm of GrayRobinson, P.A. GrayRobinson has 10 offices in Florida and provides legal services to all areas of business. He was the Firm's first LEED Accredited Professional.

Terry is a member of NAIOP on the national, state and local levels. He chairs the Sustainability Committee of NAIOP Central Florida and is a member of the USGBC, Central Florida Energy Efficiency Alliance and the Florida Green Building Coalition

GREEN LEASING – HERE TO STAY

- Why?

Many federal, state, county and local governments and agencies require that their rental space be located in green buildings

An increasing number of private companies are making this a company policy

Landlords and tenants can realize costs savings, as well as other benefits

It is required by law or rule

Its the right thing to do

!

WHAT IT TAKES

- It takes (at least) two –
 - Landlord – increased rents and sales price, “Differentiation”
 - Tenant – increased productivity and decrease in absenteeism
 - Federal, state or local government mandate or incentives
 - USGBC – maintain certification
 - Lenders – adds to value of collateral
 - Employees – they want to work in a superior workplace

GREEN LEASE

- What is a “Green Lease”

No set definition by law, USGBC, etc.

Watch out for “Green Washing”

What is the intent of the parties?

Can be different based on the type of building or its use (office, warehouse, retail, or residential)

Usually tied into achieving and maintaining the building certification (LEED, Green Globe, etc.)

INCENTIVES

- Consider using a lease structure which offers both the landlord and the tenant financial incentives
- Energy costs can be almost a third of a building's operational costs, but such costs are a small portion of the tenant's overall costs of operation
- If the increased costs of building and operating a green building are passed through to the tenant directly, they don't see a financial benefit

THE ISSUE

- Who pays the additional costs to build and operate a green building, and who benefits from the savings?
- Landlords do not want to be responsible to guaranty the operational costs of the building with a Net lease, since these costs primarily result from the tenant's actions and are thus outside of the landlord's control
- Tenants want the lowest possible costs of occupancy.
- It is harder to require green leases in buildings with numerous tenants (sub metering is expensive and may be prohibited by local ordinances)

- **Who blinks first?**

If the parties compromise, a gross lease with reasonable escalation clauses will reward a landlord for running an efficient building, and rewards the tenant with lower operating costs and the benefits of green office space.

NET VS. GROSS LEASES

- **Net:**

Traditionally, commercial leases are net. In addition to the base rent, the landlord passes through the operating costs of the building to the tenant.

- No incentive for landlord to save, since costs are passed through
- Limited ways for tenant to save, especially in
 - multi-tenant buildings

- **Gross:**

Not common in private commercial buildings

Commonly used by United States Government Agencies

Lenders and building owners are unfamiliar with gross leases and are wary of changing

- No incentive to tenant to save, since its rental amount is fixed

NET VS. GROSS LEASES CONTINUED

- **Modified Gross ("Split Incentive")**

Incentivizes landlords to operate as efficiently as possible, to reduce energy costs

Sets base rate from first year's usage, with yearly adjustments (CPI, increased operational costs, scheduled rent increases) which permit landlord pass through certain escalations over the base amount

- encourages tenants to conserve, to reduce escalation amounts
- landlords can increase their yields by operational costs efficiencies
- allows landlords to pass through capital costs of energy saving improvements, on an amortized basis, usually limited by the amount of savings realized from such improvements

This is the form of lease recommended by BOMA

TERMS OF A GREEN LEASE

- Leases must deal with the specific character of the building and the tenant's intended use
- Often use exhibits to set forth the rules and regulations
- Set forth requirements related to buildout. Tenant's contractor must have a LEED AP coordinating the work. Landlord to approve plans, materials to be installed, disposal of waste materials. May require tenant obtain LEED CI certification
- Tenant to provide landlord with information on utility use, with right to inspect and audit.
- Requires green recycling and cleaning

TERMS OF A GREEN LEASE CONTINUED

- Limitation on hours of occupation and on weekend and evening usage
- Rules on repairs and alterations
- Any sub-leases and assigns must agree to comply with building rules and restrictions
- Limitations on equipment used (Energy Star)
- Use of occupancy sensors and HVAC monitoring devices
- Requirements related to removal and demolition of the end of the lease
- If the building has energy generation devices, there may be requirements for tenants to purchase same or all of their needs



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MICHELLE HENRIE, LEED AP ATTORNEY

- Michelle Henrie, LEED AP is an attorney who handles all aspects of land development as well as water law throughout New Mexico. She is a member of the Governor's Blue Ribbon Water Task Force and Secretary of NAIOP New Mexico.

- **Top Three Tips**

- Do not imply that a building has achieved LEED certification (at any level) if it has not.
- Do not represent that a building will perform to certain standards (e.g., happier employees, lower costs) if you do not have actual performance data from that building to support your claim.
- Know which tasks are critical to your team's goal (e.g., certification level or performance standard), and make sure that design and construction contracts clearly allocate responsibility for each of these tasks.