

# THE LIABILITY OF BUILDING GREEN

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# THE LIABILITY OF BUILDING GREEN

How Insurance Plays a Role in Construction Risk

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## GBI Mission

- The Green Building Initiative is working to accelerate the adoption of green building practices that result in energy-efficient, healthier and environmentally sustainable buildings.

## What is the GBI?

- Formed in 2004; 501(c)(3) non-profit
- Headquartered in Portland, OR
- Dedicated to accelerating adoption of green building practices
- Help homebuilder associations start green building programs with their builder members
- Own US License to Green Globes environmental assessment and rating system

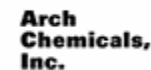
# Environmental Assessment and Rating Tool



# GBI Members/Supporters



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## How to Ask Questions:



# Polling Question #1

- Which industry do you represent?
  - Architects
  - Engineers
  - Building Owners and Managers
  - Contractors and Commercial Builders
  - Home Builders
  - Developers
  - Government
  - Environmental
  - Manufacturer
  - Legal
  - Insurance

## Ujval Vyas, Ph.D., Esq.

- Ujval Vyas is the principal of Alberti Group, a Chicago-based interdisciplinary consultancy specializing in emerging issues in the building industry including sustainability and high-performance buildings, BIM, and alternative project delivery systems. He has lectured and published extensively on legal and business risks in the sustainable building marketplace, covering large-scale policy, insurance, legal, and technical issues. Prior to becoming an attorney, Dr. Vyas taught and lectured at architecture schools at both the undergraduate and graduate levels in the United States and Canada, and served as the director of the Institute for Architecture and the Humanities in Chicago. Dr. Vyas can be reached at [uvyas@albertigroup.net](mailto:uvyas@albertigroup.net).



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## Introduction- Ujval Vyas, Ph.D., Esq.

- Is there such a thing as green building risk?
- Why are we here today?
- How does this panel fit in with our last two presentations?

## Polling Question #2

- Do you believe that green building adds an additional layer of risk to your projects?
  - Yes
  - No

# The AEC Industry & Green Buildings

Bob vanArsdall  
XL Design Professional



## Bob vanArsdall

- Before joining XL Design Professional, Bob was the government programs director for the IT Group, a \$1.4 billion dollar publicly-traded environmental engineering company which was a part of the huge merger and acquisition trend in the 90's. He worked in environmental engineering and hazardous site remediation from 1983 until 1994, during the time when environmental was a fun place to be.
- He has experience in both operations and sales in engineering, and has considerable experience in strategic planning, mergers and acquisitions, and internal ownership transition planning on the consulting side.
- As an author, Bob has contributed to national and international business publications, and is called on frequently to speak on marketing and management issues at industry, national, and international forums. He has been a frequent speaker at the US national and regional AIA and ACEC conferences, and at GLOBE, ACEC, and RAIC meetings in Canada.
- Bob graduated from the University of North Carolina at Chapel Hill, did graduate work at LSU in Baton Rouge LA, and has an MBA from North Carolina State University's innovative MBA program, which concentrates on the management of high-technology companies and the use of technology for competitive advantage.



## The AEC Industry & Green Design

- Less than 20% consider themselves “very” experienced
- Over half have attempted at least one project
- 25% of those with experience achieved LEED with at least one project

## More

- 24% report seeking staff w/ LEED® AP
- 86% still believe green costs more
- 78% said clients thought it cost more as well
- 1/3 difficulty sourcing green products

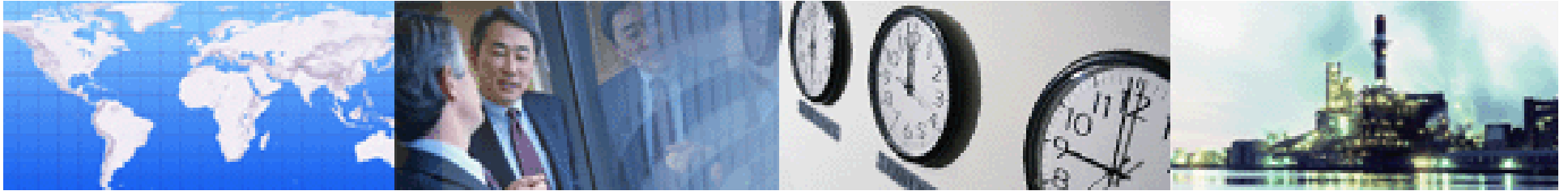
## The Owner's View

- No surprise, first cost
- 35% willing to spend 3-5% more
- High interest; few “experts”
- Energy consumption ranks high

## Risk Management Problems

- “Dabblers” vs. “Specialists”
- Management of expectations
  - Both parties are naïve to process
  - Process controlled by 3<sup>rd</sup> party
  - Indicators of success are not well scoped

# Strategies to Manage Risk



## The Basics Still Matter

- Promotional materials
- Client selection
- The team
- The agreement

## Addendum to the Contract

"the signing of the declaration/affirmation is for purposes of certification only with the USGBC, and is considered an owner/client service benefit and as used herein, the words **certify, affirm and declare** shall mean an expression of the Consultant's professional opinion to the best of its information, knowledge and belief, and does not constitute a warranty or guarantee by the Consultant."

## Innovative Design

- New products
- New use for a familiar method
- May not be evident at the start
- Address it in your agreement



## Client Acknowledgement

- Process or component may be untested  
AE has conducted a reasonable amount of testing
- It may not work as intended
- Client has weighed the risks/rewards

## The Biggie: Communication

- Are you both speaking the same language?
  - Expectations
  - Motivations
  - Documentation



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## Polling Question # 3

- Have you discussed you company's participation in sustainability efforts with your insurance broker, insurance carrier, surety broker or you in-house risk manager?
  - Yes
  - No

# Contractor Concerns and Considerations on Confronting Chartreuse Challenges and Commitments

Edward B. Gentilcore, Esq.  
Duane Morris, LLP

## Edward B. Gentilcore, Esq.

- **Edward B. Gentilcore** is vice head of Duane Morris' Construction Group. Mr. Gentilcore practices in the areas of general and complex commercial litigation with a considerable emphasis on construction litigation, construction contracts and mechanics' lien matters. Mr. Gentilcore has represented owners, developers, architects, engineers, contractors, construction managers, specialty trade contractors, subcontractors and material suppliers in construction-related matters, including those involving design-build, delays, extras, contract negotiation and compliance, construction safety, payment and mechanics' liens issues. He also has considerable experience in the preparation of design and construction contracts, with a focus on dispute prevention considerations. Mr. Gentilcore has handled a variety of matters involving sports, educational, utility, hotel, industrial, institutional and multi-use residential and commercial office facilities.
- Recognized as a Pennsylvania Super Lawyer in Construction and Surety Law, Mr. Gentilcore has authored seminar materials and delivered numerous educational presentations on various topics related to construction and surety law around the United States.



# Benefits of Achieving Green Building Status

- In addition to reducing impact of building/construction on the environment and use of energy resources, there are now other incentives growing in availability
- Maryland provides tax credit for construction or renovation of buildings that satisfy LEED criteria
- New York grants a tax credit if an owner decides to build or renovate “Green”
- Pittsburgh City Council approved Ordinance on 11/14/07 allowing 20% more height and 20% more floor space for certified buildings

## Benefits of Achieving Green Building Status (cont.)

- Los Angeles considering even more mandatory measures on both public and larger private projects
- Greensburg, KS passed resolution that all city-owned buildings will be aiming for LEED Platinum rating

## Most Discussions Focus On...

- Economics and merits of sustainable design, the impact of LEED, and the role of the USGBC; or
- Credits and materials to earn the desired level of LEED certification

## Often lost in these discussions is daunting task of constructing a building...

- Need to focus on procedures which can be implemented during planning, design and construction phases of project
- The key is to facilitate submission of necessary information during construction, at substantial completion and well before certification process begins

## Legal Considerations in Drafting Agreements

- To achieve desired green performance level or LEED certification, RFP, scope documents, and contract drafts should clearly identify
  - Objectives to be sought
  - Goals to be achieved
  - Responsibilities of respective parties to assure that those objectives and goals are satisfied
  - Consequences to those parties in event desired objectives and certification are not obtained

## Legal Considerations in Drafting Agreements (cont.)

- Primary issues in any design or construction agreement:
  - Price
  - Scope of work
  - Schedule
  - Mechanics of transmission of information (such as submittals and RFI's)
  - Mechanics of change orders
  - Allocation of risk for delay and cost increases
  - Authorized persons to act on behalf of the parties
  - Dispute resolution
  - Warranties and guaranties
  - Expectations of quality

## Green Contracts: The Early Years

- In earliest contracts incorporating Green Building/LEED rating objectives, contractual requirements not as detailed
  - Subject treated most heavily in requests for proposals and specifications
  - Some reference to the requirements set forth in general conditions
  - Some cost elements specifically identified, but not always
  - Little discussion of document management and procedures to be followed in order to obtain (or facilitate obtaining) LEED rating
  - Little identified in terms of penalties for non-compliance

## Green Contracting Today

- As projects continue to seek Green Building/LEED rated status, more contractual (but not enough) attention is being paid to requirements
  - Specific dollar values being allocated towards Green-based efforts
  - Specific certification levels/targets are being identified within contractual requirements
  - Efforts needed to obtain certification points are being incorporated into the specifications and, in some instances, contract documents

## Green Contracting Today (cont.)

- However, what about?
  - Failure to achieve project certification
  - Implications of not having a certified facility at desired level
  - Implications of and remedies for failure to achieve underlying point requirements
    - As project is ongoing
    - At substantial completion/during project close-out

# Future of Green Building Contracts

- More can be done:
  - Review LEED project checklist for points tied to design and construction activities
  - Evaluate and consider which requirements are more appropriately “design based” versus “construction based”

## And now, some specifics from the Contractor's Vantage Point:

- Notwithstanding anything contained in the Contract Documents to the contrary, the Contractor shall only be responsible for compliance with the specific LEED™ Credits criteria set forth herein and only to the extent the design and materials selections identified are consistent with the aforesaid Credits criteria, the consistency of which is agreed to be beyond the scope of the Contractor's obligations under the Contract Documents.

## Reps. and Warranties

- Notwithstanding anything to the contrary contained herein, the Contractor represents and warrants that it will perform the work required by the Contract Documents, but does not guarantee or warrant that the work as performed in conformance with the Contract Documents will result in the award or certification of any specific Credit point or points by the USGBC under the LEED™ criteria otherwise set forth in the Contract Documents.



## Compliance with All Laws, Codes and Regulations

- Caution to the contractor regarding unintended obligations from “standard boilerplate”:
  - By virtue of the foregoing language, the Contractor does not warrant or represent that it assumes that the design and materials specified are compliant with the any LEED™ related requirements or standards imposed by the Contract Documents or which may otherwise be required by applicable law.

## Future of Green Building Contracts

- Special insurance and bonding considerations
  - Be aware of possible limits of traditional coverages
  - May not reach warranties and guaranties
  - Some carriers are reacting with green-related policies
    - Fireman's Fund
    - Travelers
  - Surety bonds must be revisited as well to assure coverage for failure to achieve “green” objectives

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# Sustainable Buildings and the Surety

Bryan M. Seifert, Esq.  
CNA Surety



## Bryan M. Seifert, Esq.

- Bryan M. Seifert is an in-house counsel at CNA Surety in Chicago where he concentrates in the analysis and resolution of performance and construction defect claims. Previously, Mr. Seifert was a construction attorney for a Chicago law firm where he specialized in surety and fidelity law. Mr. Seifert worked as an architect in Chicago before becoming an attorney. Mr. Seifert has lectured and published extensively on surety and performance issues related to sustainable building and construction risk management and is a contributing editor for the American Society of Civil Engineers (ASCE) *Journal of Construction Engineering and Management*.

# What is a Surety?

- A surety is generally a large financial institution that issues a bond
- What is a bond?
  - Three party contract
  - Owner, Contractor and Surety Company
  - Surety guarantees performance of the construction project
- Why use a bond?
  - Manage financial risk and guarantee performance objectives
  - Contractor prequalification
  - Protect public funds

# Traditional Risk Drivers for Sureties and Sustainable Building

- Primary Risk Driver: Mismatched Expectations

## Assertions and Claims:

- Conflicting claims of costs as an overall percentage of the contract price
- Unverified epidemiological and anthropogenic claims relating to occupant health and productivity
- Claims of improved operation and maintenance of the building asset without establishing proper measurement and verification protocols
- Claims of energy efficiency not tied to quantifiable performance objectives

# Traditional Risk Drivers for Sureties and Sustainable Building

- Primary Risk Driver: Mismatched Expectations

Risk management in the face of conflicting claims

- Define sustainability expectations, aspirations, benchmarks and prescriptive requirements in the contract
- Coordinate project specifications and warranties with contractually or legislatively mandated ratings and benchmarks to ensure design and performance intent
- Be mindful of the contractor's expertise in the arena of sustainability in face of the growing demand for sustainability experience

## A Legislative Example

- District of Columbia Green Building Act of 2006  
Surety Bond Requirements
  - On or before January 1, 2012 all applicants for construction of privately owned buildings governed by the Act must provide a performance bond that shall be due and payable prior to receipt of a certificate of occupancy;
  - The penal sum of the bond is set at a rate of between 2% and 4% of the construction price depending on the square footage of the building; and,
  - The performance bond shall be forfeited to the District and deposited in the District's Green Building Fund if the building fails to meet the certification requirements of the Act.

## A Legislative Example

- District of Columbia Green Building Act of 2006  
Fundamental problems
  - Vague language suggests that LEED is an accredited standard resulting in possible interpretations of LEED as a performance specification as opposed to a prescriptive requirement
  - Failing to define the parties to the bond
  - Misunderstanding of sustainable building rating systems that require input and control of several parties to a construction project that may or may not be in privity of contract or under the control of the contractor
  - Automatic deposit of the penal sum of the bond into a green building fund held by the District without a determination of liability or certification
  - Determination of the forfeiture of the penal sum of the bond deposited into the green building fund by the same agency responsible for verification under the Act

# Guaranteeing Sustainable Building Performance

- Performance Contracting

## Advantages of Incentive Based Design-Build Performance Contracting for New Construction

- promotes better integration between the project stakeholders
- provides an incentive to the design-builder by giving it a stake in the ultimate performance outcome of the project
- requires the design-builder to design and build efficiently without incorporating generic assumptions that may exist in certain rating systems which do not further sustainability goals
- promotes incentives for proper commissioning
- requires clearly stated and contractually specified goals
- provides for accountability in the event a contractually specified energy performance standard is not obtained

# Guaranteeing Sustainable Building Performance

- Rethinking Sustainability Objectives

## Surety Bonds and Performance Contracting

- Surety bond is a three party agreement between the owner, contractor and surety company as opposed to an insurance policy which is a two party agreement between the insurer and insured
- Surety bond could guarantee shortfall in contractually specified level of energy savings
- Guarantee could be pecuniary
- Guarantee could require the surety to takeover and complete the improvements to ensure energy savings
- Surety bond guarantee may be more valuable to the owner as the monetary value of shortfalls will undoubtedly be less than the actual cost to correct improvements to ensure energy savings

## Conclusion

- The flurry of activity in sustainability, especially as it relates to legislation and claims about the benefits of green, must not forget the industries that support the construction industry such as insurers and sureties.
- Insurers and sureties must be able to account for their risk, provide products that support the building industry's sustainable goals and provide products that can perform in the marketplace.
- Construction industry stakeholders should re-think their sustainability objectives and further develop their own contracts, delivery systems and insurance requirements which ensure performance outcomes rather than blindly adopting rating systems.

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# Green Construction Law Overview

Stephen Del Percio, Esq  
Arent Fox



## Stephen Del Percio, Esq.

- Stephen Del Percio is a construction attorney in the Manhattan offices of Arent Fox, where his practice focuses exclusively on assisting clients in the design, construction, and real estate industries on matters ranging from construction contract and corporate drafting to litigation. Mr. Del Percio holds a degree in civil engineering and worked as project manager on a high-rise office building in Times Square prior to becoming an attorney. He is a frequent author and lecturer on green building issues and is also the publisher of greenbuildingsNYC, an online journal that profiles green projects in the New York City area, as well as discusses the broader legal issues implicated by green design and regulation. Mr. Del Percio can be reached at [delpercio.stephen@arentfox.com](mailto:delpercio.stephen@arentfox.com).

## Stephen Del Percio, Esq.

- Green Construction Law Overview
  - *Legislative Challenges*
    - Political Process
    - Constitutional Law
    - Antitrust
  - *Potential Causes of Action Arising Out of Green Projects*
    - Fraud
    - Negligence
    - Negligence per se
    - Breach of Contract
    - BIM, Trademark, & Insurance Implications

## Brief Survey of Existing Legislative Schemes

- **Boston, MA**
  - Location-specific credits
  - Branch of local government created to review applications; USGBC kept out of the loop
    - “LEED Certifiable” and insurance implications for design professionals?
- **Washington, DC**
  - Poorly-drafted legislation
  - Letter from McCallum
    - Incorrect use of term “performance bond”
    - Key concepts left open
    - Conflict of interest
- **Babylon, NY**
  - Incorporates LEED by reference into local building code
  - “Town of Babylon hereby adopts . . . LEED-NC V2.2 and, further, **automatically adopts** any future versions promulgated by USGBC.”
    - Local government does not participate in USGBC decision-making process

## LEED Creep: Gaia Napa Valley Hotel Project

- **LEED Creep**
  - Defined in 2006 *Building Design + Construction* Magazine Green Building White Paper as public LEED mandates “creeping” over to private projects
- **Gaia Napa Valley Hotel, American Canyon, California**
  - Opened November 2006
  - Obtained LEED Gold Certification in July 2007
  - Local ordinance offered \$1 million tax rebate for occupancy tax revenues
    - “Until they **have the designation**, they don’t get the credit. They will be responsible for collecting the occupancy tax and rebating it to the city.” – City Manager Richard Ramirez
  - Case law exists where owner sought damages from contractor in amount equal to tax credit; direct byproduct of failure to understand legislative regime and use of form contracts without any risk transfer provisions.

## Specific Legal Problems with State and Local-Level Green Legislation

- **Undemocratic?**
  - Removes control over local building code or zoning ordinance from public oversight and transfers compliance to third-party organization
- **Unconstitutional?**
  - Provisions of referenced rating system challenged as “arbitrary and capricious, not bearing any substantial relation to the public health, safety, and welfare?” (*Euclid versus Ambler Realty*)
- **Violative of antitrust?**
  - Manufacturers or suppliers excluded from rating system and thus market as legislation proliferates?
- **Pre-empted by federal activity?**
  - *AHRI et al. v. City of Albuquerque*
    - Local Energy Code exceeds requirements of U.S. Department of Energy for HVAC equipment; scheme challenged by Air Conditioning Contractors of America via lawsuit in federal District Court; delay in Code’s implementation until October; legislation signed back in January.

## Suggested Legislative Best Practices

- **Maintain oversight and demand transparency**
  - Don't essentially leave certification verification, permit approvals, TCO receipts, etc. at the feet any other third-party organization over which your local government does not exercise oversight
- **Protect your municipality from attack on grounds that legislation is “arbitrary and capricious”**
  - Insist on verifiable, performance-based data when making legislative decisions
- **Demand that legislation allow for more than just one rating system**
  - Antitrust issues are still murky; emphasize product, not process
  - Note USGBC's recent decision to open up wood credits outside of FSC
- **Pre-emption case law is vast and complicated**
  - New Mexico case could have broad implications, particularly if new administration is as active as anticipated at federal level.

## Connecting Legislation to Insurance

- Owner suffers partial or total loss after municipality enacts third-party mandate
  - Owner now obligated to rebuild to certain level of formal certification
  - Will property insurance policy cover costs of certification?
  - Will property insurance policy cover costs of systems, materials, etc. necessary to secure required rating?
  - Absent endorsement, no. (Fireman's Fund, Lexington, ACE, Liberty Mutual).
- However, third-party systems can be a moving target!
  - E.g., will coverage be available if LEED 2009 Silver is different from LEED-NC 2.2 Silver?
  - Owners must read policies carefully and pay close attention to legislative activity.

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## Polling Question:

- What did you think of today's webseminar?
  - Very valuable
  - Valuable
  - Neutral
  - Not very valuable
  - Not valuable at all

## Panel Discussion & Questions from Audience



## For More Information:

- To learn more about becoming a member of the GBI please visit: <http://www.thegbi.org/commercial/use-green-globes/join.asp>
- If you would like a 30-day-free trial of Green Globes New Construction please visit: <https://www.thegbi.org/commercial/use-green-globes/account/register.asp?a=12>
- If you would like a 30-day-free trial of Green Globes Continual Improvement for Existing Buildings please visit: <https://www.thegbi.org/commercial/use-green-globes/account/register.asp?a=13>

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# Marketing My Company As Green

- November 4 and 11