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Understanding LEED certification in R.E. and construction contracts

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By now, just about everyone in the real estate industry knows how ambiguous the term "green building" is. A green building can be anything from a building with a well-kept lawn to one that generates power from the exhaust of passing buses and contains a corner-office sanctuary for endangered beluga whales. So stakeholders now are careful to define "green" in their contracts. One of the more common methods of defining "green" is by reference to the Leadership in Energy and Environmental Design (LEED) system. But, without a full understanding of the LEED process, incorporating LEED into real estate and construction contracts can cause misunderstandings, disputes, and inefficient allocations of risk and responsibility.

LEED was created by the U.S. Green Building Council which awards certification to projects based on the number of qualifying "green" development techniques executed. The more such techniques executed, the more credits the project scores and the higher the level of certification. A project that scores 26 credits will be "Certified." A project with more credits can be awarded the higher "Silver," "Gold," or "Platinum" certifications.

Real estate and construction documents now often specify the level of LEED certification a project is expected to attain. But, while not as vague as the term "green," reference to LEED certification is far from clear. Mathematically, there are, as astounding as it sounds, something like 20 quadrillion different combinations of 26 credits under the LEED system and, therefore, around 20 quadrillion different definitions of the term "LEED Certified." Not quite the level of predictability most of us expect in our contracts.

Take, for example, a landlord and tenant who agree that the landlord will supply the tenant with a LEED Certified building. The tenant may believe the improved air quality of a LEED building will result in higher worker productivity. But the landlord, who isn't motivated by concerns about the productivity of the tenant's workers, may score 26 credits without even attempting to obtain any LEED credits for improved air quality. The landlord will deliver a LEED Certified building, but not one that meets the tenant's expectations. Similar issues will arise between the owner and its architect, contractor, and lender and, in states with transferable tax credits for green buildings (and a bill providing for such a tax credit in Connecticut is pending in the state legislature), the purchaser of the owner's tax credit.

The key to drafting effective contracts for LEED certified buildings is to understand that LEED certification is not a single yes-or-no question. Rather, each credit is its own question and must be addressed separately. A tenant should specify which LEED credits a landlord must deliver; an owner should be clear with its architect about which credits the design must achieve; and a purchaser of green tax credits, who would likely want the building to achieve credits that can be, at least tentatively, confirmed early in the construction process, should detail its expectations.

This approach will also help resolve one of the thorniest issues surrounding contracts, particularly construction contracts, for LEED buildings. Owners often want architects to be liable for a failure to obtain LEED certification. But a project can, for example, be denied certification because a contractor fails to properly dispose of construction waste - a matter over which the architect has no control. Similar issues arise in leases where the landlord and tenant are each assigned aspects of a build-out. However, if each LEED credit is addressed separately, this dilemma is easier to resolve. Approached in this manner, each party can be allocated liability for failure to score those LEED credits over which it has primary control.

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