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Building Green: The Hottest Topic in an otherwise Cold Market

Energy concerns abound and while the "green" movement has been on the fringes in the past, it is no longer the disfavored step-child in the Real Estate Market. In today's economy, smart builders, designers, contractors and counsel know that to keep pace with the marketplace they must be prepared to tackle the newest challenges brought on by the demand for Green Buildings. What does it all mean and how can you be prepared?

Building Green: The Basics

Green design, in its simplest terms, means design and construction practices that significantly reduce or eliminate the negative impacts of buildings on the environment and its occupants in five areas: (1) sustainable site planning; (2) safeguarding water and water efficiency; (3) energy efficiency and renewable energy; (4) conservation of materials and resources; and (5) indoor environmental quality. *See* United States Green Building Counsel. To monitor and grade the effectiveness of achievement in obtaining these design and construction practices, a Green Building Rating System known as "LEED", short for "Leadership in Energy & Environmental Design" has developed. A building can obtain four (4) possible levels of LEED certification based upon a graduated point system assigned for various green elements contained in the building. The ratings levels are as follows:

Certified Level	26-32 points
Silver Level	33-38 points
Gold Level	39-51 points
Platinum Level	52-69 points

Points are accumulated based on factors such as: site selection, water efficiency, energy and atmosphere, indoor environmental quality, material and resources used, innovation and design, and the use of a LEED-certified professional on the design team.

The Challenges of Building Green: It is going to cost more, right?

While it may be in vogue to get on the "green bandwagon," it is not always a simple decision to "build green". While decisions regarding energy supply and building materials can make a big difference in energy efficiency, multiple decisions are made during the building process that affect whether or not your building will obtain LEED certification, or to what level. The selection of the building site can be the first critical choice. Equally important can be the design team and whether you chose to use a LEED-certified professional. Thus, the "building green" decision should be well thought out in advance, and should be reflected in your contracts with your design-build team and project management. An analysis of average green costs versus a non-green building costs needs to be performed, so an assessment of cost-benefit can be performed. Studies have shown that "green costs" increase in proportion to the level of LEED certification sought. (USGBC, Capital E Analysis; Sasaki Associates 2004). Nevertheless, the challenge is to balance "first costs" against "life cycle" costs for the building.

Pitfalls and Practice Tips for Green Design and Construction

To protect yourself in the Building Green process, it is important that you carefully select team members that are familiar with the current green products and LEED certification process. One of the most common criticisms of the LEED standard is the amount of paperwork and interaction with United States Green Building Counsel needed to register a project and conduct a LEED rating audit at the end of the construction of the building. It can be hard to know exactly how many points will be awarded on a project until the final audit, and this can create tension for the developer who built a project with the goal of achieving a "Platinum" certification, only to find out that he fell one or two points short in the final audit.

To avoid unpleasant surprises, it is important that you have your contracts updated to ensure that you have appropriately allocated the responsibility for the final Green Certification level. Incorporate your performance objectives into your design, construction and contract documents in the most specific manner possible. For example, it may be appropriate to your project to specify, "meet 20% of heating load with passive solar", or "use products meeting or exceeding EPA's recycled content recommendations". In your architect selection process, select architects with green design credentials, experience and LEED certification, because design can have the most impact on energy consumption.

Building green can boost your bottom line. Building green can give you an edge on the competition and enhance your company's image. Like any other building endeavor, you need to select the right team of professionals who work together collaboratively to design and build a structure with a well-integrated system.

For more information about Building Green, contact **Mary March** at 215-610-2460 or e-mail her at MGM@PIETRAGALLO.com. You are also welcome to contact **Joe Bosick**,

the Chair of the Construction Practice Consortium, at 412-263-1828 or e-mail him at JJB@PIETRAGALLO.com.

Failure to Obtain Consent of Surety Prior to Final Payment as Required by Construction Contract Is Inexcusable Despite Absence of Such Requirement in Surety Bonds

Many construction contracts, including AIA Form A201, require a party, often the architect, to obtain or confirm the consent of surety prior to the distribution of either final payment or retainage withheld on the project. In a recent opinion, Great American Insurance Co. v. Norwin School District, No. 07-2441, 2008 U.S. App. LEXIS 20435 (3rd Cir. Sept. 29, 2008), the United States Court of Appeals for the Third Circuit considered language in a construction contract providing that "[n]either final payment nor any remaining retained percentage shall become due until the Contractor submits to the Architect through the Construction Manager … consent of surety, if any, to final payment." The construction manager admitted that it did not obtain the consent of surety before certifying a general contractor's final Application for Payment on two school district projects. Among other issues, the court was asked to determine whether this failure amounted to a breach of the construction contract.

The construction manager provided several justifications for certifying final payment while lacking consent of surety. For instance, the construction manager had not experienced problems with the general contractor on past projects, and the general contractor performed well in the instant project. Also, the construction manager asserted that time was of the essence, as contractors and subcontractors want to be paid promptly, while the school district owner, through its board, met only once monthly to approve and issue payments. Finally, the construction manager relied on the general contractor's representation that consent of surety would be forthcoming. Unfortunately for the construction manager, it was unaware that the general contractor had failed to pay several subcontractors and suppliers, who had in turn made claims against applicable payment bonds in the amount of approximately $800,000.

The construction manager argued that the terms of the construction documents required consent of surety if, and only if, requirement of consent of surety was provided for in the surety bonds. The Third Circuit considered case law that supported this position. Namely, a federal district court had previously held, interpreting a similar contractual provision (i.e., the contractor must submit "consent of the surety, if any, to final payment"), that a consent of surety requirement must appear in documents other than the construction contract, perhaps in the surety bonds, to be valid and enforceable. *See* Exchange Nat'l Bank of Chicago v. U.S. Fidelity & Guarantee Co., No. 81C7119, 1985 WL 2123 (N.D. Ill. July 25, 1985).

The Third Circuit declined to follow the decision in Exchange Nat'l Bank, noting that no other courts had endorsed its holding. Further, the Third Circuit disagreed with the rationale set out in that opinion. Instead, the court held that the phrase "if any" was meant to qualify the word "surety," such that consent to final payment is required any time a surety is involved in a construction project. Because a surety was involved under

the facts of the case, the consent of surety to final payment was required. As a result, the Court held that the general contractor breached the terms of the contract documents by failing to obtain the surety's consent.

This decision confirms that there is generally no legally acceptable excuse for failing to obtain the surety's consent, despite the practical difficulties such a requirement may cause architects, construction managers, or any other parties upon whom the burden to obtain or confirm consent of surety is delegated by contract. Where the contract calls for such consent, the best practice is to obtain and confirm it prior to certification of final payment, regardless of the absence of language in any applicable surety bonds requiring consent.

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Buildings, Structures – What's the Difference?

In a recent decision by the Commonwealth Court of Pennsylvania, the Court has explained that the relatively new Pennsylvania Uniform Construction Code, 34 Pa. Code. § 401, et al. ("Uniform Code") applies not only to buildings, but also to "structures". Sabatine v. Lower Mt. Bethel Township, No. 452 C. D. 2008, Pa. Commw. LEXIS 435 (September 18, 2008). In that case, a "stop work order" had been issued by the Township because the land owner had failed to obtain a building permit for a retaining wall which he was erecting on his property in Lower Mt. Bethel Twp. The structure consisted of pre-cast concrete blocks which were permanently affixed to the ground and stood above ground level in excess of four feet. The Township issued a violation notice for failing to obtain a permit and the Uniform Construction Code Board of Appeals Slate Belt Council of Governments affirmed the violation notice. Sabatine then appealed to the Commonwealth Court.

On appeal, Sabatine argued that the Uniform Code applied only to buildings and not structures. The Pennsylvania Construction Code Act, which is the legislative basis for the Uniform Code, was adopted by the Legislature in 1999 to establish uniform and modern construction standards throughout the Commonwealth, particularly because many municipalities had no construction codes to provide for the protection of life, health, property and the environment. 35 P.S. 7210-10.102(a)(1). *See* Act of November 10, 1999, P.L. 491, as amended, 35 P.S. §§ 7210.101-7210.1103. The Department of Labor and Industry in turn developed regulations regarding construction which became effective April 9, 2004. Those regulations included a requirement for obtaining a building permit for retaining walls over four feet on commercial projects. 34 Pa. Code. § 403.42(c)(iii).

Sabatine argued that the Uniform Act did not apply to structures but only to buildings, citing Section 104(a) of the Act, 35 P.S. § 7210.104(a), which states that the Act applies "to the construction, alteration, repair and occupancy of all buildings in this Commonwealth." (emphasis added) The Court, in rejecting that argument, pointed out that the Pennsylvania Dept. of Labor and Industry promulgated the Uniform Code which

applies to the "construction, alteration, repair, movement, equipment, removal, demolition, location, maintenance, occupancy or change of occupancy of every building or structure which occurs on or after April 9, 2004 . . . .". 34 Pa. Code. § 403.1(a) (emphasis added). The Code goes on to define a structure as "[a] combination of materials that are built or constructed with a permanent location or attached to something that has a permanent location." 34 Pa. Code. § 401.1.

While this case may seem to have relevance only for the individual parties, it is clear that the Commonwealth Court intends to take a very broad approach to the definition of structure in determining the applicability of the Pennsylvania Uniform Code. Commercial project owners and builders alike should be aware of the issue if they intend to construct any type of structure, regardless of whether it is a building.

For more information about the case, contact **Anthony Basinski** at 412-263-4346 or e-mail him at AJB@PIETRAGALLO.com.

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West Virginia Supreme Court of Appeals Considers West Virginia Architect and Builders Statute of Repose, W. Va. Code §55-2-6a

The West Virginia Supreme Court of Appeals recently reversed a decision dismissing a claim for construction defects that was filed more than 10 years after construction was complete.

The case arises from a home constructed by J.D. Marion in 1993 or 1994, originally purchased by David and Beverly Jordan in February of 1994. In the summer of 1996, Jerry and Karen Neal entered into negotiations with the Jordans to purchase the home. Marion participated in the sales negotiations between the Jordans and the Neals and made representations that there were no problems with the foundation. Marion made several undisclosed repairs subsequent to the Neals' purchase of the home. In addition, Marion provided a warranty for future repairs which might be necessary if the Neals purchased the home.

In 2002 and 2003, professional engineers inspected the property and opined that the foundation was severely flawed, unsafe and inadequate for the home's design and location. The engineers further opined that the foundation had undergone prior substandard repairs that had been actively concealed by "walling in" and "covering up" large portions of the foundation such that a routine home inspection would not uncover the work.

In October of 2004, the Neals filed suit against J.D. Marion, the Jordans, and others. The suit contained claims alleging that the home was not constructed as expressly or impliedly warranted at the time the home was sold; fraudulent and material misrepresentations about the condition and quality of the home and the nature and extent of prior repairs; refusal to remedy the problems and/or to cancel the contract; concealment of defective construction so that it would not be discovered through a reasonable inspection; and unfair or deceptive acts or practices.

Marion filed a Motion for Summary Judgment arguing that W.Va. Code §55-2-6a barred the Neals' claims because the complaint, alleging that the design and/or construction of the foundation was flawed, was filed more than 10 years after the construction of the home, and therefore, was beyond the Statute of Repose. In response, the Neals argued that Marion made misrepresentations about prior repairs and the condition of the foundation in August of 1996. The Circuit Court granted Marion's Motion for Summary Judgment and dismissed the claims against Marion.

The Neals appealed the decision to the West Virginia Supreme Court of Appeals arguing that the fraud and misrepresentation claims arose from separate acts which were distinct from the construction. They further argued that subsequent acts which alter, conceal, or misrepresent the condition of the original construction operate to start the statute's time limits anew. The West Virginia Supreme Court of Appeals agreed with the argument.

W.Va. Code §55-2-6a provides as follows:

> No action, whether in contract or in tort, for indemnity or otherwise, nor any action for contribution or indemnity to recover damages for any deficiency in the planning, design, surveying, observation or supervision of any construction or the actual construction of any improvement to real property, or, to recover damages for any injury to real or personal property, or, for an injury to a person or for bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property, may be brought more than ten years after the performance or furnishing of such services or construction: Provided, That the above period shall be tolled according to the provisions of section twenty-one of this article. The period of limitation provided in this section shall not commence until the improvement to the real property in question has been occupied or accepted by the owner of the real property, whichever occurs first.

The Court articulated a careful analysis of the history of the West Virginia Architect and Builder's Statute of Repose. The purpose of the statute is to protect architects and builders from increased exposure to liability as a result of the demise of the privity of contract defense. The 10-year statute bars recovery in three general areas: (1) damages for any deficiency in the planning, design, surveying, observation, or supervision of any construction, (2) damages arising from the actual construction of any improvement to real property, and (3) bodily injury or wrongful death arising out of the defective or unsafe condition of any improvement to real property.

In the past, the West Virginia Supreme Court of Appeals has declined to apply the discovery rule to permit a claim arising from an alleged latent defect in the construction of a home that was not discovered until 12 years after the construction was completed. Unlike previous cases in West Virginia, the Neals' case involves allegations that the original builder performed subsequent work on the home after the original construction had been completed. The Court of Appeals found that this subsequent work operated to start W.Va. Code §55-2-6a's time limitation anew for claims related to that subsequent work.

The West Virginia Supreme Court of Appeals went on to state that a subsequent act which modifies or repairs the original design or construction of real property constitutes an "improvement" to the original construction for purposes of W.Va. Code §55-2-6a. The purpose of the statute is not to protect a builder for actions taken after the completion of the original construction to conceal or inadequately repair a problem with the original design or construction. The time limit of W.Va. Code §55-2-6a begins to run when the builder or architect relinquishes access and control over the construction or improvement AND the construction or improvement is (1) occupied or (2) accepted by the owner of the real property, whichever occurs first.

The case was remanded to the Circuit Court for a determination as to when Marion's actions in repairing, altering, or walling in the foundation to conceal its defective nature occurred.

For more information on W.Va. Code §55-2-6a, contact **Michelle Gorman** at 740-282-6705 or e-mail her at MLG@PIETRAGALLO.com.

If you would like to be added to or removed from our electronic mailing list, please let us know by e-mailing us at INFO@PIETRAGALLO.com or by calling 412.263.2000.

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