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Loss Control

# Bulletin

## Architects and Engineers

### Professional Liability Insurance

### Sustainability – Implications for Design Professionals

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There is a growing trend toward the construction of “green” or “sustainable” buildings. While to date most of these buildings have been constructed for public sector clients as models for others to see, or for private sector companies wishing to demonstrate their corporate social and environmental responsibility, there is some momentum for the expansion of the sustainability movement. We will inevitably see an increasing number of developers moving toward the construction of green buildings to attract the segment of the buying market that is keenly interested in environmental issues. Sustainability does, however, come at a cost and clients must be prepared to absorb the higher costs often associated with constructing a green building. This runs contrary to the historical approach to construction which was focused primarily on economics. There is no doubt that we should all be concerned about the protection and sustainability of our environment – it would be illogical to think otherwise – but design professionals must also ensure that they are not caught in a conflict between a client’s demand for economic development and the desire for a green building. Clients must be committed first and foremost to making the financial commitment required for a green building.

As we have seen over the years, clients are primarily interested in having their projects completed on time and producing income as quickly as possible.

Many are unfamiliar with the construction process and only understand what the end result is supposed to produce or how the project will appear. Now that the green building concept has hit their radar screens, clients may begin demanding sustainable building projects without being knowledgeable about all of the ramifications that this will entail from a design and construction standpoint. Furthermore, they may have seen or heard about Leadership in Energy and Environmental Design (LEED) certification and will demand that their project achieve such status. There are rigorous requirements for achieving LEED certification and consequently all parties must understand their respective roles and be committed to achieving the certification. Failure to do so may result in the project failing to be certified, thus leading to claims amongst the parties.

There are a variety of reasons for which a project may not be certified, and some may be difficult to control. In addition to deficiencies in the design or construction of the project, other factors such as the lack of availability of the desired materials and/or building systems, or the failure of the project to meet required performance criteria for energy or water use may result in certification being denied.

The issue of performance raises an interesting question: who is responsible for the project attaining LEED certification? It would not be reasonable to make the design professional accountable for certification if the client utilizes the traditional tendering approach for construction, awarding the project to the low bidder. Constructing a sustainable project requires collaboration from the beginning and some suggest that the best approach is to adopt a design-build model. The design-builder would then be responsible for ensuring that the project met the requirements for LEED certification.

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From a liability standpoint, design professionals must ensure that they are not being exposed to unnecessary and/or uninsurable liability. They must not take the responsibility for ensuring that the project will be LEED certified. They can only agree to produce a design which will result in certification if the project is constructed in accordance with the contract documents and the specified materials are available for the project. There is also a need for a party to assume responsibility to assemble all the necessary documentation for review by the LEED certifiers. It may be argued that, as is the case for record drawings, the design professional should assume this responsibility. The liability exposure associated with this responsibility and any failure to obtain all relevant documents required for certification would, however, be much greater, as the project owner may have used the LEED certification for marketing purposes and/or may argue that the lack of certification will diminish the resale value of the property. Design professionals should incorporate appropriate language in their agreements to set out the level of responsibility and liability they are prepared to assume.

Design professionals can also obtain LEED accreditation through the Canada Green Building Council by passing an exam and obtaining the LEED Accredited Professional designation. There is some debate over whether such designations will result in a higher standard of care expected of the design professional and thus expose the individual to unexpected liability. It is recommended that such individuals address the standard of care issue in their agreements.

It is not unforeseeable that all owners will one day expect some or all of their projects to be LEED accredited or at least incorporate elements to be sustainable or green buildings. Furthermore, as we have seen over the years, the standard of care expected of design professionals as established by court decisions may result in a presumption that the design professional has or should have the necessary design skills necessary to achieve LEED accreditation or its equivalent, once again raising the bar in terms of the level of performance expected of the profession.



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