



# FORUM REPORT

FINANCE AND COMMERCE

Special Advertising Section

LEEDing Green Development

## An ounce of prevention...

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GRAY PLANT MOOTY

**B**enjamin Franklin's words remind us of what we already know intuitively — that taking appropriate preventative measures before trouble appears is a much better option than trying to handle problems after the fact. While this notion has universal application, it is especially sound advice where “green” is concerned.

One of our jobs as lawyers is to reduce to writing the terms of the deal struck between a client and other parties. This exercise has at least a couple of important purposes.

First, the process of drafting and reviewing the written version of a transaction brings to light inconsistencies or missing elements. The process helps the parties focus on the details of what was intended and how to allocate responsibility.

Second, document preparation gives the parties a chance to consider and address what happens if things don't go as planned. I have yet to hear of a construction project that went from start to finish without some unexpected twist — increased costs, delays, casualties, strikes or change orders that throw off the schedule. Careful documentation sets out the mechanisms to address the situations everyone hopes will not occur.

Most commonly used architect and construction contract forms have provisions that help to draw out the details necessary for accomplishing the parties' intended goals. These

forms often also contain elaborate remedy sections guiding the dispute resolution process in the case of performance failures. But as is well demonstrated in the case of *Southern Builders v. Shaw Development*, contracts that don't specifically address the expectations for sustainable development or the consequences for failing to meet those expectations will be the basis for lawsuits when things go wrong.

The *Shaw* case involved a Maryland condominium project completed in 2006. The development included many sustainable features that, according to the owner/contractor agreement, were “designed to comply with a silver certification level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design (LEED) Rating System.” The litigation started when Southern Builders, the general contractor, sued Shaw Development to enforce a mechanic's lien claim. Shaw then filed a counterclaim for \$1.3 million in damages that consisted of, among other things, \$635,000 in lost tax credits.

The basis for the claim for lost tax credits appears to be Southern Builders' failure to complete the project on time and in a manner that could be certified by a LEED accredited professional to qualify for silver certification. Under Maryland law, there were certain tax credits available only to LEED projects. One of the requirements to obtain the credits was that the project be completed and certified by a LEED accredited professional within a

specified period of time after commencement of construction. The contract in the *Shaw* case specified a completion date that was within the limits imposed by the tax credit process, but Southern Builders missed the completion date by some nine months, so the opportunity to obtain the tax credits was lost.

The case was not a clear breach of contract claim on this point, however, because the contract did not explicitly (a) impose on the contractor the obligation to deliver a LEED-certified building or (b) identify the goal of achieving the tax credits, much less allocate the risk of failure to achieve the credits.

Unfortunately, for purposes of this article, the *Shaw* case appears to have settled out of court, so we don't know how things would have been decided by the court. We do, however, learn enough to see the perils of the incomplete and indirect contract language. The lesson to be learned from *Shaw* is that a detailed expression of “green” expectations by an owner in the contract documents will better position the owner to achieve the owner's goals, and to assert a breach of contract claim if the goals are not met. Similarly, a thorough understanding of an owner's “green” expectations by the contractor or architect will allow the contractor or architect to identify the attendant risks and either insure or disclaim such risks appropriately.

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