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Are building design rating systems effective towards the goal of sustainability in the design and construction of public and private buildings and how will new energy performance and sustainable design requirements affect the professional liability of building design professionals?

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ARE BUILDING DESIGN RATING SYSTEMS EFFECTIVE TOWARDS THE
GOAL OF SUSTAINABILITY IN THE DESIGN AND CONSTRUCTION OF
PUBLIC AND PRIVATE BUILDINGS AND HOW WILL NEW ENERGY
PERFORMANCE AND SUSTAINABLE DESIGN REQUIREMENTS AFFECT THE
PROFESSIONAL LIABILITY OF BUILDING DESIGN PROFESSIONALS?

by

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A thesis submitted in partial fulfillment of the requirements
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Abstract

The following paper will explore the future of sustainable building practices as it relates to building design rating systems and whether building design rating systems are effective in conserving energy and resources in the construction of new buildings. This paper will begin by highlighting some of the general principles behind sustainable design practices, and the challenges of determining if building design rating systems are utilized effectively towards the goal of sustainability. In addition, the paper will highlight issues specific to ongoing litigation in Gifford v. U.S. Green Building Council and allegations made within the lawsuit that question the methodology and efficacy of building design rating systems. How political and ideological influences have propelled sustainability practices into the mainstream, and to what extent government is and should be involved in regulating building design rating systems will also be explored. Lastly, how will new energy performance and sustainable design methodologies, which are now being required in the law, affect the professional liability of building design professionals in the future?

Dedication

To my brother, James R. Transue, whose death in January of 2011, at the age of thirty-eight was a reminder for me to appreciate the simpler things. I will miss him.

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Introduction

Energy conservation has been practiced sporadically over the course of modern human history with mixed results. Conserving energy and natural resources in order to allow them to replenish is the most prudent of lessons that can be taught to the next generation. In the last few decades leading up to 2011, the sustainable development movement has grown to influence the building design and construction industries to develop into building design rating systems that promote the application of certain design principles (Brundtland, 1987). These principles are intended to limit the impact of development of buildings and building systems on the environment by promoting conservation of resources and the application of energy efficient design practices.

Building design rating systems are not without cost (Gifford, 2008). Building owners typically pay a premium to certify that their buildings are designed to the particular standard used (Gifford, 2008). As Jacob Gershman of the New York Post states “developers and officials say LEED often adds 5 percent or more to project costs (Gershman, 2009).” The extra costs are often pitched as an investment that will help to preserve the environment, and pay for itself over time (Ihnen, 2007). Whether the use of building design rating systems and sustainable design practices have been effective in conserving energy and resources in the design and

construction of buildings and communities remains to be seen(Navarro, 2009). On the other hand, the affect that building design rating systems has had on the design professions has beenprofound (Caravella, 2011).

Building design rating systems have arguably changed the design professional's role in the design and construction process. The influence of sustainable design on the design professional's liability is already being realized (Caravella, 2011). Changing laws and standards reflect the notion that design professionals are now expected to promote sustainability as a practice separate from their contractual obligations to their respective clients (American Institute of Architects, 2007). The role of the architectural and engineering professions and the design and construction process may be forever changed as a result.

Sustainability and Building Rating Systems

Certainly, the focus of building designers has changed over the years. Many of the more general sustainability concepts that have been employed for many years were perhaps taken for granted. Some building components may not have been expected to be designed any differently from how they have always been designed. However, design professionals and others are now making note of the many different and minute components of a building and how they interact with one another to affect the overall performance of buildings (K.M. Fowler, 2009). Design professionals' interests include the cumulative effects of buildings and communities on the global environment. There has been an increased emphasis on the energy "performance" and the environmental impact of buildings that surpasses any immediate or seen benefit of one entity (U.S. Green Building Council, 2009). How the buildings affect the environment and society over time is now paramount to how a building is designed (American Institute of Architects, 2007). As a result, building design rating systems are one of the measures that have developed in order to "certify" that a building is environmentally friendly (U.S. Green Building Council, 2009). Prominent and popular among these is the Leadership in Energy and Environmental Design (LEED) system (Gifford, 2008).

LEED was developed by the United States Green Building Council (USGBC) as a guide for the application of green building design practices (U.S. Green

Building Council, 2009). USGBC is a nonprofit organization that promotes sustainability in building design (U.S. Green Building Council, 2009). The LEED Green Building Rating Systems “are a set of performance standards for certifying the design and construction of commercial or institutional buildings and high-rise residential buildings of all sizes, both public and private. The intent is to promote healthful, durable, affordable, and environmentally sound practices in building design and construction (U.S. Green Building Council, 2009).” LEED is “voluntary, consensus-based, and market-driven (U.S. Green Building Council, 2009).” To qualify as a LEED designed building, points are credited for every conceivable item in the design and construction of a building related to the sustainable ideal, from bicycle racks to roof membranes (U.S. Green Building Council, 2009). As can be imagined, the initial costs of a building using ‘state of the art’ materials might be increased as a result, but efforts to refine the design process to include various “metrics” of “performance” are promoted as the type of technical analysis that will save the environment and, over time, money (U.S. Green Building Council, 2009).

The resurgence in building design practices that is being pushed by the sustainable design movement does require more diligent research, expertise and forethought of how the construction of individual buildings and communities impact their surrounding environment and beyond (U.S. Green Building Council, 2009). Yet, how well rating systems and sustainable design practices really help to conserve the environment is not always clear (Ihnen, 2007). As an example, under

some criteria the monetary costs of transportation and delivery of construction materials might be considered more costly due to the “carbon footprint” created, compared to if local resources are utilized instead (U.S. Green Building Council, 2009). The increased accumulation of carbon in the atmosphere from human activities is considered by many scientists to be the main contributor to “man-made global warming (Solomon, 2007).” Exhaust from combustion automobiles releases carbon dioxide into the air and so transporting materials from across the country is considered to unnecessarily add to the buildup of carbon dioxide in the atmosphere. Consequently, local resources are preferred and points are gained through the use of methods and materials that are intended to help prevent the expenditure of carbon dioxide that could further deplete the atmosphere (Solomon, 2007). As a result of this way of thinking, “carbon credits” are even promoted and traded on the open market, allowing some companies to buy the ability to produce more carbon from other companies that have been successful in producing less (Robbins, 2007).

The ability to measure the impact of a particular chemical compound in the air is very difficult and has been viewed by the general public with a great deal of suspicion and apprehension (The Wall Street Journal, November 24, 2009). Policies that are created on the basis of the unseen benefits of sustainability are difficult to implement without the political will (Shaub, 2011). Most can agree on the basic conservation concepts, but the implementation of laws that potentially or immediately harm the economy are not easily accepted (Shaub, 2011). The LEED

system incorporates numerous items that are subjectively promoted as ideal. The promotional or marketing features of the LEED system are probably the most contentious and are one of the reasons that the LEED system is most criticized. The LEED system reward[s] designers for “predicting that a building will save energy, not for proving that a building actually saves energy (Gifford, 2008).” USGBC proudly admits to making an effort to change the public perception and the market towards the ideals that it considers being environmentally friendly (U.S. Green Building Council, 2009). Others might consider the promotional aspects to be opportunistic, considering the money that is made from building design rating systems.

In October 2010, Henry Gifford, a mechanical contractor/designer, and a longtime critic of the LEED system (Malin, 2008), filed a class action lawsuit in the Southern District of New York, which essentially alleged that LEED buildings are no more energy efficient than non-LEED buildings and that, in some cases, LEED buildings consume more energy than similar building designs (Gifford v. U.S. Green Building Council, 2010). In February of 2011, the lawsuit was strategically downgraded from a class action suit and “essentially asserts false advertising claims directly against USGBC under federal, state, and common law (Percio, Class Action No More: Gifford-Led Plaintiffs File Amended Complaint Against USGBC, 2011).” Gifford and others are asking for “injunctive relief and damages” under the Lanham Act, 15 U.S.C. § 1125 et seq., as well as “pendent state law claims for false

advertising and deceptive trade practices (Gifford v. U.S. Green Building Council, First Amended Complaint, 2011).” Gifford and others believe that the LEED system is actually harmful to the environment and they advocate for empirical measurements of “actual” performance instead of the predictions that are made by LEED and other building design rating systems (Gifford, 2008). The lawsuit may prove to eventually require green building designers to verify and validate their predictions.

Life Cycle Costs Analysis

Sustainability is a broad term that couches many concepts and terms. The potential use of, or waste of, an area or resource is considered to be sustainable. Life-cycle cost analysis is an essential technique in determining the total cost of something over time and may be the most important purposeful process in the design of a building or community. Life cycle cost analysis is a technique for measuring how sustainable something might be. As defined by the Environmental Protection Agency Life Cycle Analysis is:

LCA is a technique to assess the environmental aspects and potential impacts associated with a product, process, or service, by:

- compiling an inventory of relevant energy and material inputs and environmental releases;
- evaluating the potential environmental impacts associated with identified inputs and releases;
- interpreting the results to help you make a more informed decision (United States Environmental Protection Agency).

As an example, determining the “serviceable” life of a particular roof system and weighing the initial cost savings of repairing an existing roof system, as opposed to replacing the entire roof system, can allow a building owner the time to procure the

necessary funds or resources for the eventual replacement. How long the roof system will serve for the benefit of the building is the subject of the analysis (Kalinger, 2009). Divestment of money and resources for long term maintenance is a life-cycle cost approach.

Life-cycle costs and other sustainable practices were not always thought of in terms of a monetary investment as they are likely to be described today. Indigenous peoples may not have been as concerned for the monetary cost of a resource, but they certainly factored in the worth of local resources to their survival. Consider something as simple as a water filter, which helps to clean a water source. A water filter will eventually be depleted over time, but it can be used for much longer if it is not overburdened. It is important to note that life cycle cost analysis assumes the eventual degradation of the particular resource.

There has been considerable interest in the life-cycle cost analysis of our country's resources over the decades. Strategies have been utilized over the years to influence conservation in ensuring that resources are not wasted unnecessarily. Economic evaluation of energy and water conservation has been the focus of many government programs simply because they have such an immediate and important impact on our communities. How we approach energy resources also affects international politics and commerce. Many organizations in the federal and state governments have policies and standards that are intended to educate the general public on the strategies that are implemented by our government, government

officials and in our laws. In fact, The U.S. Department of Commerce annually publishes materials to help towards the goal of analyzing those costs.

The National Institute of Standards and Technology (NIST) Handbook 135, 1995 Edition is a guide published by the U.S. Department of Commerce and the U.S. Department of Energy. “Handbook 135 is a guide to understanding the life-cycle cost methodology and criteria established by the Federal Energy Management Program for the economic evaluation of energy and water conservation projects and renewable energy projects in all federal buildings (U.S. Department of Commerce, 1996).” “Life-cycle cost analysis (LCCA) is an economic method of project evaluation in which all costs arising from owning, operating, maintaining, and ultimately disposing of a project are considered to be potentially important to that decision (U.S. Department of Commerce, 1996).” The NIST Handbook 135 has various statistical and analytical data that helps in the forecasting of the country’s energy resources.

Of course, the many standards that are published by the government are generated for a variety of different reasons. Because government organizations are scrutinized to ensure that they are properly using tax dollars, many strategies have been developed to justify the disposition of those funds. It may not always seem that federal and local governmental organizations are the best stewards of the public’s money or resources. That government has the potential (perhaps tendency)

to prolong programs despite their effectiveness is paramount to the importance of making sure that the policies put in place perform their proper function.

Difficult as it may seem to implement policy within government agencies, it is perhaps more difficult to create the kind of consensus needed for sustainability in the private sector. However because much of the waste of natural resources result from the cumulative effect of the entire populous there might be some justification for attempting to promote or market to the public. The voluntary nature of building design rating systems and standards developed to certify a buildings performance would be markedly different from requirements that would have the force of law and the many government agencies behind them. Therefore, it is vitally important to ensure that policies are proper before they become law. The challenge of whether or not a policy is proper should be considered a separate issue from how the policies function. An important aspect of governmental energy programs is that the methodologies used by these organizations are steeped in research and in analyzing data. Simply making claims about the energy efficiency of a building will not suffice without the data to support the programs that utilize tax dollars.

The Sustainability Trend in Building Design

The sustainability movement might be described as an attempt to replicate the cyclical processes of nature with an emphasis on reusing and preserving immediate resources for the future or as “development that meets the needs of the present without compromising the ability of future generations to meet their needs (Brundtland, 1987).” Much of the demand for natural resources is in constructing and maintaining buildings and communities for the benefit of society. According to the U.S. Green Building Council

In the United States alone, buildings account for:

- 72% of electricity consumption
 - 39% of energy use
 - 38% of all carbon dioxide (CO₂) emissions
 - 40% of raw materials use
 - 30% of waste output (136 million tons annually), and
 - 14% of potable water consumption (U.S. Green Building Council 2010)
- (Birge-Wilson, 2010).

Limitations on the use of resources in the construction of building systems can have a substantial impact on the building industry, the economy and society as a whole.

Sustainable or Green Building design is a philosophy that promotes the conscientious design of buildings and building systems with an emphasis on conserving energy and resources over the life of the buildings, and the communities that they are built in (U.S. Green Building Council, 2009). Because of the growing emphasis and popularity of the sustainability movement, there may be a presumption that building designers had not previously taken energy consumption and sustainability into account, or that any previous efforts were limited in scope. In fact, aspects of sustainability have always been recognized by design professionals. For example, wastewater management (sewage) and water retention (irrigation) are sustainability concepts that many people take for granted but have been employed for centuries. Treating and maintaining the available water resources was somewhat more localized in antiquity and was born out of necessity. The benefit of having such systems often determined a community's survival. Ensuring proper management of water resources and waste water helped to prolong growing seasons for the production of food, prevented the spread of disease, and allowed communities to thrive in otherwise barren regions of the world. Many of the same practices from hundreds of years ago are still used and still needed today.

Some design professionals consider sustainability to be the latest trend. (Business Insider, 2011). To imply that it is a trend is not meant to discount the importance of the design and construction of buildings to meet certain environmental and energy efficiency performance criteria. Yet, the trend aspect of

building “green” cannot be denied. There are building designers and contractors, previous to the trend, that have and continue to design and construct buildings with a passion for conserving costs and limiting the building “footprint” on the environment (Kerr, 2011). Building design professionals and construction professionals that employed these practices before they were popular now may find it necessary to become LEED certified in order to prove that they have the training necessary to design buildings to the standards that are now expected, regardless of whether the green building requirements actually save energy (Butters, 2008). The sudden influx of some design professionals and others to invest in (and cash in on) design ideas that have not been empirically proven should be regarded with apprehension, (Navarro, 2009) especially, when there are legitimate grievances with the methodologies used and the motives behind the systems being promoted (Gifford v. U.S. Green Building Council, 2010). A growing number of knowledgeable professionals have been building momentum against the sustainability trend and building design rating systems because of the real potential to harm the environment and to reward unsubstantiated and potentially poor design practices (Kerr, 2011). These design professionals emphasize focusing on design principles that have been proven over time, towards the goal of sustainability, instead of relying on a point system that may not take into account, or be applicable to, the unique needs of each independent building design (Kerr, 2011).

The reason sustainability might be described as a trend relates to current political and ideological movements that might be best discussed from a sociological point of view (Cook, 2006). Importantly, many of the political interests that are pushing the trend do not always have a firm grasp on the sciences that make a building more efficient, nor are they necessarily interested in facts that do not support their particular political point of view. The debate over global warming is just one aspect of the political discussion that has propelled sustainable design to prominence. In 2008, e-mails from two prominent global warming experts were leaked to the public. In the emails

scientists appear to urge each other to present a ‘unified’ view on the theory of man-made climate change while discussing the importance of the ‘common cause’; to advise each other on how to smooth over data so as not to compromise the favored hypothesis; to discuss ways to keep opposing views out of leading journals; and to give tips on how to ‘hide the decline’ of temperature in certain inconvenient data (The Wall Street Journal, November 24, 2009).

In their zeal to promote certain policies the scientists appeared to be conspiring to make data fit conclusions on their theories of man-made global warming. The temptation to slight their critics, in the end, proved only to taint their credibility, and that of their peers.

In *Gifford v. U.S. Green Building Council* there is also a controversy, based in statistics. Until USGBC had commissioned the New Buildings Institute (NBI) to analyze measured energy performance for 121 LEED New Construction (NC) buildings (New Buildings Institute, 2008), there had not been any data to verify claims that LEED buildings were any more efficient than any other newly constructed buildings. Statistical valuations made by NBI appeared to qualify USGBC's advertised claims that LEED certified buildings perform 25-30% better than non-LEED certified buildings in terms of energy use (Gifford, 2008). However, the data that USGBC anticipated would validate the design recommendations that they promote, have instead given its detractors the ammunition to make the claims alleged in the lawsuit.

The NBI study compared actual to predicted energy use, and compared both to national average energy use in existing buildings as reported in the U.S. Department of Energy's Commercial Buildings Energy Consumption Survey (CBECS) (Malin, 2008). As defined by the United States Energy Information Administration, "the Commercial Buildings Energy Consumption Survey (CBECS) is a national sample survey that collects information on the stock of U.S. commercial buildings, their energy-related building characteristics, and their energy consumption and expenditures (U.S. Energy Information Administration)." The most recent CBECS survey was conducted in 2003. The LEED buildings are compared to the CBECS data set from all existing buildings regardless of year of

construction, whereas the lawsuit argues that they should have been compared to only new buildings, because all LEED buildings have been built or renovated after the year 2000 (U.S. Green Building Council, 2009). Additionally, NBI used the median of the LEED data set and compared it to the mean of the CBECS data set and did not even publish the mean of the LEED data set. The US Energy Information Administration reports mean values in their CBECS reports (Gifford, 2008)(Gifford v. U.S. Green Building Council, USGBC Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint, 2011).

Whether USGBC willfully used “false advertising, marketing and promotion” to “intentionally and willfully confuse the public and consumers, and to materially mislead consumers as to the nature, characteristics and/or qualities of its product (Gifford v. U.S. Green Building Council, First Amended Complaint, 2011)” will be determined in due time. There are certainly reasons to suspect that the data was finessed to fit their desires, such as the elimination of unsupportive data sets. After all, USGBC does not hide that they “promote” and “market” to change the public perception of how buildings should be designed. The National Research Council Canada (NRCC) has conducted their own analysis of the full NBI dataset “with the goal of adding greater statistical rigour to their original analysis.” (National Research Council Canada, 2009). The NRCC report appears to reluctantly acknowledge that “28-35% of LEED buildings actually used more energy than their conventional counterparts.” Concerns that LEED buildings do not perform as well

as advertised should be just as concerning to USGBC as when Henry Gifford points it out, yet USGBC's legal defenses he is referred to as a "longtime gadfly" as if the criticism of the LEED data set is not warranted. Many design professionals are watching this case closely, because it has the real potential to invalidate USGBC's dominance in the sustainability movement. An important point made by Nadav Malin in his article "Lies, Damn, Lies, and... (Another Look at LEED Energy Efficiency)" of "how LEED is being misused (Malin, 2008)", perhaps misses the point that USGBC LEED rating system may have been intended for misuse. Whether it is appropriate for a nonprofit organization like USGBC to attempt to steer the public and an industry in such a drastic direction for ideals that cannot be substantiated by the approaches used, is what the lawsuit is ultimately about.

It is not all that alarming that ideology and politics plays a role in the development of such a broad strategy, nor is it surprising that the principles might quickly become convoluted in the political process. What is disconcerting about a green "trend" is the potential effect that it has to cancel out the technological advances and benefits that have been gained over the last several decades that rightfully stand on their own. The effect of a green trend could essentially render any further organized attempts towards "global" sustainability as useless.

Opponents of USGBC argue that the LEED system only creates the image of energy efficient buildings (Gifford, 2008)(Kerr, 2011). Many scientists would agree with this assessment:

Often sustainable development ends up being development as usual, with a brief embarrassed genuflection towards the desirability of sustainability. The important matter of principle therefore becomes a victim of the desire to set targets and measure progress (The World Conservation Union, 2006).

Without real change towards sustainability, there should be no reason for the additional costs. In fact, the additional costs could instead be used for more appropriate design goals, like the refurbishment of an existing building. If the design community is more interested in creating new multimillion dollar facilities in the name of sustainability while otherwise ignoring the intent of sustainable design practices then there is a dangerous disconnects (Kerr, 2011). Sometimes not to build at all is the best course of action. The fact that many older buildings have been highlighted as being more efficient than some newer buildings including some LEED certified buildings should also give the design community pause.

Despite one's political persuasion, the objective physical constraints to how a building can be designed is the most difficult to improve on. Economic factors such as availability and cost of materials still contribute to the types of building products available in the marketplace and effectively limit the choices for building design professionals and contractors in the design and construction of buildings. As can be imagined, large material manufacturers play a pivotal role in the sustainability movement. The ability of large material manufacturers to efficiently produce large quantities of materials at reduced costs makes it difficult for more expensive, less

available, experimental products to be considered. It is hard for a building designer to ignore the reliability of products and practices that are readily available and that have withstood the test of time.

Material manufacturers are currently more than happy to promote the green trend, as long as it benefits their respective marketing strategies. Material manufacturers reinvent and promote their products as “Green” despite any indication that the products were any different prior to the trend to be green. For many years companies have quietly reprocessed byproducts in their manufacturing processes only now to claim items are green because of the use of recycled materials. Some products might be innately more “green” than others (Wilson, 2006). Should those products be promoted as if the manufacturer’s efforts were the reason behind the distinct character of the product? If the green brand were to be perceived by the public as a gimmick then those companies might abandon the “green” term as quickly as they have adopted it. Many companies are already implementing the notion that they were “green before green was cool” (Viracon, 2009)(openly suggesting green as a trend), and the mere saturation of the “green” label has made the supposed sacrifices somewhat patronizing. Undoubtedly, there is a real concern that misrepresentation in the marketplace might slow the progress of the green movement, which could have the effect of marginalizing the systems intended to promote sustainability. Interestingly, the Federal Trade Commission (FTC) has recently proposed revisions to their green guides to give businesses and the

marketing community some limitations on claims of being green or environmentally friendly, recognizing that many of the claims cannot be substantiated (The FTC's Green Guides, 2010).

Perhaps what is most compelling about the sustainability trend might be the potential harm to the environment and the economy that could result by the attempted comingling of idealistic and politically motivated environmental goals, marketing strategies, and the application of scientific design principles. If the cost of going green substantially affects the consumer in a negative way the emphasis will be on whom the immediate beneficiaries of the policies are—Industry—and not on the long term benefits to society. Whether companies produce green products and services out of self-interest does not seem to matter to the consumer as long as products are reasonably affordable. When gasoline prices are prohibitively high, oil companies become the focus of the public's vitriol. Certainly, the competing interests of the private sector are always subjective, but the public excuses a degree of self-interest provided that it is not extreme. The public will not tolerate companies that charge a premium for products that are promoted as being environmentally friendly without some validation of the advertised benefit. Hence, to mitigate fluctuations in the competitive marketplace, some would argue about whether the federal or state governments, in their supposed benevolent role, should be more or less involved in dictating the energy performance requirements of buildings much less the criteria for building design rating systems. The FTC's

aforementioned guidelines are just one example of the government's cursory involvement in regulating the sustainability movement. At some point the government's role may be much more substantial than it currently is.

Whether the government should have a role in the sustainability movement is secondary to the fact that government is already substantially involved. For example, the U.S. Army Corps of Engineers require extensive air barrier and performance testing of newly built and renovated buildings (Dalton, 2009). The protocol that the U.S. Army Corps of Engineers has developed is being utilized in the private sector as the standard for this type of testing. The Energy Star ratings that are promoted by the U.S. Environmental Protection Agency and the U.S. Department of Energy are very popular programs that have a direct impact on individual consumers (Energy Star, 2011). Electric appliances are required to have their average energy consumption on them. The governmental influence on the trend to be green should not be underestimated. The effect of the federal government and administrative agencies on state and local communities can have a profound impact on the economy and should regularly be measured. Federal government policies regarding sustainable buildings can negatively have an impact on local codes, state statutes, and individual rights. These types of programs are generally introduced as voluntary in order to prepare the public for the changes to come. Regardless, legal challenges are likely to occur in the wake of laws created on

behalf of the green building movement, particularly where there is a perceived injury.

Gifford v. USGBC

On April 6, 2011 attorneys for the U.S. Green Building Council filed a Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint (MTDFAC). The First Amended Complaint (FAC) was previously filed by Henry Gifford's attorneys on February 7, 2011. Gifford had dropped the class action claims filed in the original lawsuit and limited the number of plaintiff's to a handful of design professionals presumably because of the difficulty of showing injury by USGBC on the broad populous. Regardless of the change, it did not stop USGBC from continuing to assert in their Motion to Dismiss that there was simply no standing for the lawsuit. If proper allegations of standing are judged to be missing in the FAC then the issues argued by the plaintiffs will not be heard.

It is not unusual to at first make the defense that there is no injury to the plaintiffs and thus no case. It is typically the first argument to be made in a case – whether there should be a case at all. After all, allegations are easy to make and defending against allegations, even if untrue, can be difficult simply because of the presumptuous nature of accusations. The courts have recognized that injury to a plaintiff can be very subjective and that claims of injury should be scrutinized even before the court will hear a case. There are requirements that must be met in order for a lawsuit to continue to discovery. During discovery the plaintiffs will be

allowed to subpoena records from USGBC. Information might be revealed during discovery that could be construed to support the original allegations. Therefore, getting to discovery is an important threshold to cross for the plaintiffs in this case.

USGBC's preliminary statement in the MTDFAC is very critical and quickly attempts to discount the FAC for being noncompliant with the Federal Rules of Civil Procedure Rule 8(a) and Rule 12(b) (1) and (6). The rule states "pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for (1) lack of subject matter jurisdiction; and ([6]) failing to state a claim upon which relief can be granted(Percio, USGBC Files Motion to Dismiss Henry Gifford's Amended Complaint, 2011)." USGBC argues in their preliminary statement that the rule should be "as construed by the U.S. supreme Court in *Twombly* and *Iqbal*."USGBC is asserting that the Gifford's allegations are not plausible and that they must be "above the speculative level." The courts have given further meaning to the Federal Rules of Civil Procedure, Rules 8 and 12, in other cases and the USGBC in their opposition relies primarily on two cases, (*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) and (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), to attempt to discount the FAC. (Gifford v. U.S. Green Building Council, USGBC's Reply Memorandum of Law in Further Support of Motion to Dismiss the First Amended Complaint, 2011)

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the United States Supreme Court established the "standard for evaluating whether a complaint is sufficient to survive a motion to dismiss" (*Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009))

concluding that a “flexible ‘plausibility standard,’” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render a claim plausible (*Twombly* at 157-158).” *Twombly* dispenses with the literal reading of Rule (8) and allows some latitude to “prove no set of facts in support of his claim which would entitle him to relief (*Conley v. Gibson*, 355 U.S. 41 (1957).” Since *Twombly*, the accepted pleading standard is that: “once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint (*Bell Atl. Corp.* at 563)”, which allows the court to discriminate between the conceivability and plausibility of allegations made in a complaint.

In *Ashcroft*, Javaid Iqbal was designated a person “of high interest” in the aftermath of the September 11th, 2001 terrorist attacks on the United States. He was detained, pled guilty to criminal charges, and was imprisoned. The complaint did not dispute his arrest or detention but had to do with his alleged treatment while detained at an administrative maximum special housing unit. The complaint alleged “invidious discrimination” by government officials including the former Attorney General of the United States and the Director of the Federal Bureau of Investigation (*Id* at 1948). The U.S. Court of Appeals for the Second Circuit upheld a denial of the motion. The U.S. Supreme Court later held that the “complaint failed to plead sufficient facts to state a claim for purposeful and unlawful discrimination against the petitioners”. *Iqbal* focused on the court’s interpretation of *Twombly* as

the nexus between what was permissible under Rule (8) of the Federal Rules of Civil Procedure and what was considered plausibly and factually sufficient to allow the case to continue.

According to USGBC, *Iqbal* and *Twombly* essentially require that Gifford show a plausible, non-conclusory allegation of fact to support further proceedings. USGBC only passively introduces *Iqbal* and *Twombly* as an argument for dismissing the case under the Federal Rules of Civil Procedure and makes few references to the cases themselves, which appear to run contrary to USGBC's main argument, even with the "heightened" pleading requirements of *Twombly*. In particular, one argument that was rejected in *Iqbal* was that "*Twombly* should be limited to its antitrust context (*Ashcroft* at 1941)." This effectively allowed a less restrictive interpretation of *Twombly* in support of allowing allegations that might otherwise be dismissed. This fact is readdressed in the Plaintiff's Opposition to the Defendant's Motion to Dismiss (PODMTD) that was filed on May 2, 2011. In the PODMTD, Gifford argues that the *Twombly* instead allows a more liberal interpretation of the pleading requirement in antitrust claims.

Once USGBC incidentally alludes to *Iqbal* and *Twombly*, they proceed to argue some more specific reasons why they believe that there is no standing in the case. The USGBC

allege[s] that (1) the plaintiffs fail to properly allege that they are competitors of USGBC such that they can maintain their false advertising claims; and (2)

the amended complaint's allegations of injury are "conclusory," "general," and "too disconnected" from any "specific wrongdoing" by USGBC to demonstrate an "injury-in-fact" to confer standing on the plaintiffs (Percio, USGBC Files Motion to Dismiss Henry Gifford's Amended Complaint, 2011).

The USGBC's main premise is that the "plaintiffs lack standing to assert their Lanham Act false advertising claim because they do not, and cannot properly allege that they are competitors of USGBC, or that USGBC has caused them any direct competitive injury (Gifford v. U.S. Green Building Council, USGBC Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint, 2011)." USGBC does acknowledge the Second Circuit's vague interpretation of the "direct competitor" test and the "reasonable commercial interest" test in determining standing for false advertising claims under the Lanham Act. The Lanham Act is the trademark act of 1946, which among other things prohibits false advertising (§ 43 (15 U.S.C. §1125)).

Gifford disputes USGBC's contention that the parties are not direct competitors or that they are not competing in a commercially driven market (Gifford v. U.S. Green Building Council, Memorandum of Law in Response to the Defendant's Motion to Dismiss, 2011). Gifford also further argues that direct competition is not a requirement for Lanham Act standing and defines how the Second Circuit has interpreted that standard (Gifford v. U.S. Green Building

Council, Memorandum of Law in Response to the Defendant's Motion to Dismiss, 2011).

By contrasting the differences between what services USGBC and the plaintiffs provide, there may be some reasoning for the court to conclude that the parties are not direct competitors. But the type of “consulting” that both parties provide has a wide range of fields that involve many different professions that may be considered as “amorphous” as antitrust complaints allow and enough to merit a “reasonable commercial interest”. In *Twombly* the Second Circuit stated:

We have consistently rejected the argument – put forth by successive generations of lawyers representing clients defending against civil antitrust claims – that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometimes amorphous nature or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts. (*Twombly*)

In the PODMTD, filed May 2, 2011, the plaintiff makes the point that “just because the Plaintiffs are not ‘in’ the Defendant’s business does not mean the Defendant is not ‘in’ theirs,(Gifford v. U.S. Green Building Council, Memorandum of Law in Response to the Defendant's Motion to Dismiss, 2011)” referring to USGBC’s argument that “Plaintiffs do not claim that they are in, or attempting to enter, the business of providing a rating system(Gifford v. U.S. Green Building Council,

USGBC Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint, 2011)”.

The argument made by USGBC of whether or not the parties are indeed competitors appears to allow Gifford some latitude to ask that the court make a determination of fact as to whether they are competing for the same “niche” market as described by Gifford in the PODMTD. Certainly the plaintiffs argue that the LEED rating system and the USGBC are much more involved in the design process than USGBC would admit. If USGBC “rates” a building according to design metrics that compete against techniques and expertise of design professionals then surely they must accept their influence on the process.

Indeed, proving that the plaintiffs have directly suffered some type of injury would be the most difficult element to establish in this case and this is acknowledged in thePODMTD by Gifford’s attorneys. True, it can be argued that ultimately the defendants may suffer for the popularity of the USGBC and LEED certifications, yet to causally attribute such a broad and “speculative” injury to any one person would be difficult (Gifford v. U.S. Green Building Council, USGBC Memorandum of Law in Support of Motion to Dismiss the First Amended Complaint, 2011). The “primarily injunctive” relief sought by Gifford is for “full disclosure, compelling USGBC to release actual utility rates in its buildings, in order to foster a healthy marketplace of ideas, as some progressive municipalities

have started to require (Gifford v. U.S. Green Building Council, Memorandum of Law in Response to the Defendant's Motion to Dismiss, 2011, p. 16).”

Regardless of whether the Gifford lawsuit advances to discovery, it is interesting that the arguments hinge on whether the consumer public is being marketed to. How this and other lawsuits related to ‘green’ or sustainable building and design will affect the public is difficult to determine at this time. How the sustainability trend is affecting the design and construction industries is much more discernable.

Evolving Design Liability and the Standard of Care

It is hard to imagine that any one group or person could be held responsible for the “performance” of a building or community with which so many independent parties have an involvement. Apart from structural and safety requirements that are generally expected and required of licensed design professionals, the energy performance requirements had always been treated as somewhat static and less consequential in the past. After all, there is only so much that can be done before the initial monetary costs will be offset by the predicted benefits. In addition, the global harm was not as apparent or distressing to the design professions as they are now. However there has been a transformation of what the design professional is now expected to provide in their designs, particularly when it comes to sustainable design criteria.

Typically, design professionals work very closely with a future building owner in determining the concept, costs, and benefits of a particular building type or design. Design professionals have historically assumed the role of educating the future building owner or developer of the options available for the design. The client typically begins the process by giving the design professionals some very broad parameters or a general scope to work within. The design professional then narrows the scope with ideas and options that fit within the client’s overall concept.

The client uses the information gleaned from the design professional's knowledge and research to further direct the design professional on how to proceed with the more specific design. In essence, the design professional does not make the ultimate decision but simply guides the client to make informed decisions that eventually affect the outcome. Fully informing the client of all of the options available for the design is not only the principled thing to do, it limits the design professional's liability.

The advice that architects and engineers give defines their obligation as design professionals. The design professional's duty or "standard of care" is determined by their own education and experience relative to the standards set by the profession. For example, "standard jury instructions in most states define the standard of care as 'doing that which the average similarly situated professional would do, or not doing that which the average similarly situated professional would not do (Butters, 2008).'" As the profession adapts to growing expectations it is imperative that efforts be made by design professionals to keep up with the latest trends.

Design professionals' liability is directly correlated to how well they inform their client of the risks or challenges of choosing one particular design over another. The importance of informed consent is often disregarded in construction litigation, but it can play an important role in protecting the design professional from liability. The "standard of care" can be properly met and still leave the designer vulnerable to

negligence if the designer does not fully inform the client of all of the benefits and detriments of particular components within the design. If a product or material fails when a relatively better suited product could have been utilized and the owner was not made aware of the options and the reasons for using the questionable product, then the design professional's diligence comes into question.

In the past the standard of care has been the design professional's greatest defense against claims of malpractice (Butters, 2008). The design professional has a varying degree of responsibility that must be gauged by the scope of work that they are involved in. Where there are strict edicts as to the design requirements, the only question is whether the design professional performed the task. However, if there is any degree of professional judgment that could be considered reasonably appropriate then the design professional's diligence is generally based on a consensus of how other similarly situated design professionals would have or would not have acted.

In 1981 the collapse of the atrium walkways of the Kansas City Hyatt Regency in Kansas City, Missouri killed 114 people and injured 216 others. A change in the design of the support structure of the walkways was not properly reviewed by the architect and engineers during the construction process. As a result, this catastrophic calamity is a case study on complacency in the design and construction process. The liability of the Kansas City disaster was placed squarely on the design professionals who failed to perform their professional duties in

ensuring that the changes that were proposed were proper. The engineers responsible lost their licenses to practice engineering and the architects of record, along with the engineers, were held civilly liable for millions of dollars to the families that lost their lives. Their performance, or lack of performance, was judged on the basis of how other similarly situated design professionals might have undertaken their duties. In Florida, the law is similar: “As regards the tort liability of engineers, one who negligently performs a professional engineering service, knowing that another person will be injured if it is negligently performed, is liable in tort, even though there is no contract between the parties (*Southland Contr., Inc. v. Richeson Corp.*, 642 So. 2d 5,9 (Fla. 5th DCA 1989).”

Of course, the loss of life associated with a structural or safety failure in the design of a building is distinct from other types of building performance issues that may not seem as immediately appurtenant to the welfare of the public. However, the sustainability movement is arguably intent on emphasizing the criticality of the cumulative effects of poorly designed buildings and communities on the environment and subsequently the risk to the welfare of the general public. Thus, design professionals must balance a sense of social obligation with the risk of assuming responsibility for factors outside the scope of their control (Butters, 2008).

As an example of just how the sustainable design movement has affected the role of the architect, recent changes in the American Institute of Architects (AIA) standard form of contract between the architect and owner reflect a drastic shift

from the less nuanced approach of giving advice to a client so that they can make informed decisions on how to be environmentally conscious when approaching the design of a building or community. Instead, the AIA Canons of Ethics now provide that “members should *promote* (italics added) sustainable design (American Institute of Architects, 2007).” The AIA documents define (although somewhat vaguely) the terms, sustainable design, sustainable development, and sustainable practices. Within the definition of the terms, members are informed that they should “*advocate* (italics added) sustainable building and site design,” “*advocate* (italics added) the design, construction and operation of sustainable buildings and communities,” and “*encourage* (italics added) their clients to [use sustainable practices] (American Institute of Architects, 2007).”

In contrast, the American Institute of Architects (AIA) and other professional organizations such as the American Society of Civil Engineers (ASCE) also make sure to attempt to protect the integrity of their professions by lobbying State legislatures for laws that define expectations of design professionals with certainty. Model Architect and Engineering Liability Laws have been published by the National Society of Professional Engineers (NSPE) and endorsed by the American Council of Engineering Companies (ACEC), the American Institute of Architects (AIA), and the American Society of Civil Engineers (ASCE) in order to reduce the number of lawsuits against architects and engineers resulting from alleged negligence in the design of improvements to real property. Yet, just as design

professionals are compelled to define and defend the nature of their professions, there are others that would require less subjective accountability. With the increasing emphasis on energy performance, the standards that are mandated by State and Federal agencies could further broaden a building designer's roll and potential for liability despite any attempts by the professions to promote a sustainable agenda.

It is interesting that the American Institute of Architects would obligate the profession to advocate for sustainability. Advocacy of sustainable design practices goes well beyond providing the client the information to make an informed choice. What's more, by advocating for a particular design approach, a design professional is inextricably linked to the design and potentially to the liability associated with the design if it does not meet the owner's "expectation of performance". With the caveat that much of sustainable design has to do with energy "performance" it is interesting how the American Institute of Architects appears to put architects in the unusually awkward and historically contradictory position of what might be perceived as enhanced liability. Under this scenario, it does appear that the design professional is a degree less obliged to the client under contract as they might be to the ambiguous standard of sustainability. The latest developments in how the courts view the economic loss rule, absent privity of contract, directly and inversely affect the standard of care and the potential for damages of the design professions.

The Economic Loss Rule

The economic loss doctrine or economic loss rule “is a judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are economic losses (*Indemnity Insurance Company of North America v. American Aviation, Inc.*, 891 So. 2d 532 (Fla. 2004).” The economic loss rule was designed to prevent parties from circumventing contractual remedies for economic losses suffered between parties in privity of contract. Privity is a relationship between parties out of which there arises some mutuality of interest (Gifis, 1991). The economic loss rule prohibited actions of tort between parties in contract for solely economic losses because parties in contract are assumed to have already “allocated the economic risk of nonperformance through the bargaining process (*Indemnity Insurance Company of North America* at 536).” If parties to a contract were allowed to bring a tort for negligence rather than under contract law, it would have the effect of changing the contract after the fact. Courts do not favor changing contracts. Their role is to interpret contracts. If the only damages suffered under contract were economic then the economic loss rule traditionally prohibited tort actions between the parties.

The common law concept of privity which had previously prevented the imposition of obligations and responsibilities outside the control of the design

professional, no longer insulates architects and engineers from the potential of being sued by third parties (*Indemnity Insurance Company of North America*). The decline of the use of privity as a defense against claims by third parties can be traced back to a famous New York case.

In *MacPherson v. Buick Motor Company* (1916), the purchaser of an automobile was allowed to sue the automobile manufacturer even though there was no contract between the manufacturer and the purchaser of the automobile. The automobile had been purchased through a dealer. Injuries sustained by the owner of the automobile for a defective wheel were awarded despite a lack of privity of contract between the parties. Until relatively recently there was still some confusion as to how privity related to circumstances other than product liability suits.

The case of *Inham v. Binghamton Housing Authority* (1957) is considered the case that effectively eliminated the privity defense for design professionals. In *Inham* a child was injured when he fell from the stoop of an apartment building. The architect was sued by the child's parents for failing to provide railings on the stoop. The lack of privity between the architect and the tenants of the apartment building was rejected by the court as a defense. The application of *Inham* precludes privity of contract as a viable defense in these types of situations. A more recent development has exposed architects and engineers to damages beyond the more egregious personal injury cases.

Previously, architects and engineers were effectively shielded by the economic loss rule from economic claims by third parties. Now they may be as vulnerable for design flaws that are far less likely to directly and physically harm the public. The few exceptions to the application of the economic loss rule now specifically allow a remedy against the negligence of design professionals for purely economic losses. In *Indemnity Insurance Company of North America* the Florida Supreme Court clarified circumstances where tort actions would be allowed for recovery of purely economic damages. One such exception to the economic loss rule that was distinguished by the court was in cases “alleging neglect in providing professional services, in which this Court has determined that public policy dictates that liability not be limited to the terms of the contract (*Id* at 537).” Or “Stated negatively, the economic loss rule does not apply in the services context unless a contract exists and none of the established exceptions to the rule apply (*Id* at 544).”

Previously, the Florida Supreme Court had adopted the doctrine that “the only remedy in such cases should be for breach of contract or breach of warranty (*Southland Construction, Inc. v. Richeson Corp.*, 642 So. 2d 5 (Fla. 5th DCA 1994)”, which was distinguished as authority in *Moransais v. Heathman* 744 So. 2d 973 (Fla. 1999) and that had replaced *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992).

In *Moransais* the lower courts were forced to rely on *Sandarac Ass'n, Inc. v. W.R. Frizzell Architects, Inc.*, 609 So. 2d 1349 (Fla. 2d DCA 1992), “which held that

the economic loss rule barred a tort action against an architect by a condominium association where the damages alleged were purely economic and the plaintiff had no direct relationship with the architects (*Moransaisat 975*).”

In *Moransaisa* home buyer sued for professional negligence against the engineers who had conducted the engineering inspection of the home he purchased (*Id.*). *Moransais* alleged that the engineers did not detect or disclose the defects that were discovered after the purchase of the home. The trial court and the appellate court ruled that the claim was barred by the economic loss rule and that there was no case of action (*Id.*). The contract was specifically with a professional engineering corporation and not with the employee engineers. Despite the lack of any direct agreement between the engineers and the home buyer, and the fact that the damages were purely economic the Supreme Court of Florida reversed the previous rulings and certified the following rephrased question:

(2) does the economic loss rule bar a claim for professional malpractice against the individual engineer who performed the inspection of the residence where no personal injury or property damage resulted?

As rephrased, we answer the first question in the affirmative and the second question in the negative. In doing so, we quash the decision below (*Id* at 974).

The Florida Supreme Court recognized a common law cause of action against professional engineers based on their acts of negligence, despite the lack of any

direct agreement with *Moransais*. In addition, the Supreme Court referenced *Lochrane Engineering, Inc. v. Willingham Realgrowth Inv. Fund, Ltd.*, 552 So. 2d 228 (Fla. 5th DCA 1989) in explaining “the difference between a general contractual duty, such as that imposed under an ordinary contract for goods or services, and the distinct duty imposed upon a professional (*Moransais* at 976).

The duty of a professional who renders services, such as a doctor, lawyer, or engineer, is different from the duty of one who renders manual services or delivers a product. The contractual duty of one who delivers a product or manual services, is to conform to the quality or quantity specified in the express contract, if any, or in the absence of such specification, or when the duty and level of performance is implied by law, to deliver a product reasonably suited for the purposes for which the product was intended . . . or to deliver services performed in a good and workmanlike manner. However, the duty imposed by law upon professionals rendering professional services is to perform such services in accordance with the standard of care used by similar professionals in the community under similar circumstances (*Lochrane Engineering, Inc.* at 232).

Simply put, architects and engineers are held to a higher standard as professionals. As a result, the courts have adopted the premise that architects and engineers are responsible to third parties for injuries both physical and economic as a matter of public policy.

The erosion of the privity barrier that previously existed between the design professional and third parties has made it more important for architects and engineers to be involved in organizing efforts to clarify their role in the process. Regardless of privity of contract an architect's or engineer's duty of care could potentially extend to a third or unknown party as it relates to the performance of the building design and their position as a professional. The USGBC's LEED program expressly asserts a claim of exceeding normal design practices (U.S. Green Building Council, 2009). A building designer's acceptance and/or close association with USGBC practices might increase their obligation to the sustainability practices and subsequently raise the standard of care.

Although distinguished as a products liability case, in *Seely v. White Motor Co.*, 63 Cal. 2d 9 (Cal.1965) the plaintiff sought recovery for economic loss resulting from his purchase of a truck that failed to perform to his expectation (*Indemnity Insurance Company of North America* at 539). In Florida, "it is possible that an engineering firm and engineers in their capacity maybe held liable in tort to both privity and non-privity parties (Weiss, 2008)." With the sustainability trend implicating poorly designed buildings and communities as being a threat to the environment, it is not difficult to consider that the third party building owner and the general public could be harmed in some way by poorly performing buildings. Therefore, generations of building owners / purchasers could find themselves offended by a building that was touted as being 'Green' if it does not perform to

expectation. For instance, if a third party, such as someone who buys a building from a developer, is able to make the connection between the financial harm that a poorly designed and inefficient building has caused them and the greater standard of care that perhaps was not employed by the design professional in designing the building, they might be able to seek damages from the designer. There is no privity of contract between the buyer and the building designer, and yet the building designer may still be obligated for damages.

As Justice Cantero points out in his concurrence in *Indemnity*, there still remains the significance of the design professional's duty of care and other traditional negligence principles such as breach, and proximate cause, that plaintiffs would be required to satisfy in a tort action against a building designer (*Indemnity Insurance Company of North America* at 544). But, as can be seen by the American Institute of Architects' willingness to advocate and promote sustainable building practices, the standard of care is already changing. Architects have accepted an acute role by accepting and advocating for the sustainability trend. Design professionals might find that they will need to be much more diligent in ensuring that their designs meet the expectation of the recipient owner.

Design professionals have a responsibility to the public as well as to the particular client that they are contracted under, particularly when the design of a structure is expected to be utilized by the general public. Obviously, most design professionals take their involvement very seriously and attempt to mitigate their

liability by simply concentrating on doing a good job. Licensed professionals risk their livelihoods and licenses in the performance of their duties. If they make mistakes they can be disciplined by their respective licensing boards and/or by the State or municipality that they practice in.

Often many aspects of the design of a building that do not necessarily affect life-safety elements are subject only to a broad range of expectations of contractual obligations between the owner and the designer. If predictions of energy performance become standardized in the law, the standard of care, or even through public perception, then the design professional may be limited to only what the law will allow in the design and further subject to the liability of not meeting any required standard. As a result, predicting the energy performance of a building may someday parallel predictions of a designer's professional liability similar to how predicting requirements of the structural performance of a building affects the life-safety of the public. If the general premise is for the overall collective energy performance of communities then the third party public might be considered to be harmed in some way by a building that burdens a community through poor energy performance.

Conclusion

The Sustainability or “Green” movement has grown substantially over the years in response to various environmental and development concerns to include the application of building design rating systems in the building design and construction industries. The numbers of interests involved in the promotion of sustainable design are vast. Federal, State, and local government organizations have a profound influence on the direction of industry and the movement towards building sustainably. Building material manufacturers, suppliers, contractors, and design professionals are but a few of the private interests that regularly position themselves in the debate over the necessity of certain aspects of sustainable design. With so many parties involved, it is not surprising that there are differences in opinions over the principles and practices in the design and construction of buildings and infrastructure.

The accepted principle behind the Sustainable or “Green” building design movement could not be more simple or virtuous. Eliminating or reducing waste in the design and construction of buildings in the interest of the environment can be universally agreed upon. Yet, just as there are differences in opinion for the necessity of certain aspects of conservation, there are still greater differences on how to achieve the goals that are mutually agreed upon. The self-assurance of some

to attempt to influence change to the building design and construction process and various industries to the point of promoting ideals that may actually be contrary to the intended purpose of limiting the impact on the environment should be vigorously questioned. If not realized, attempts to manipulate consumer behavior may prove to work against the intended goal of energy efficiency and sustainability, which could actually have the opposite effect of further damaging the environment. Concerns that the goals and interests of some may be contrary to the advertised intent should be further explored.

As importantly, whether attempts to manipulate consumer behavior and various industries through the promotion and marketing of unsubstantiated claims of energy savings are helpful towards the goal of energy efficiency and how the sustainability movement and building design rating systems may inversely and negatively affect the environment and the economy. When resources are diverted from their traditional uses, it can have an enormous impact on the economy. Disagreements might range from the more simplistic design and construction aspirations of architects, engineers, and contractors to the complex ideological and political discussions about climate change and the responsibility of our society as a whole. Regardless of whether there is a consensus on the necessity or the degree of building sustainably, the differences are already beginning to be revealed in the law and in the courtroom on several levels.

If anything, the Gifford lawsuit is should highlight the fact that design professionals should be more leery of esteeming and promoting the value of progressive changes in the design and construction processes, before all of the kinks have been worked out. Design professionals that lose sight of the reality of their own independent contractual responsibilities might suffer the consequences if they depend on the fringes of the design community to define their role for them. If building designers do not take the initiative to define their role in the process, then they might find themselves as the example case that distinguishes the law.

As a result of the sustainability movement, building performance has been elevated to a level where there is an expectation that the combined systems of a building should out-perform relative to similarly constructed buildings. Building design rating systems have been embraced by much of the building design community as a methodology for designing buildings to meet the needs of the sustainability movement. Much of the incentive for design professionals to promote building design rating systems such as LEED is in the perception of a higher level of competence for having the credential. The building design community's unreserved acceptance of building design rating systems such as LEED, has changed their role in the practice of their professions. The evolving nature of the standard of care requires that architects and engineers adapt to increasing levels of responsibility. The standard of care and the duty of the design professional have narrowed as a result of the widespread endorsement of USGBC's LEED rating

system. The economic loss rule no longer is barred as a means to recover purely economic losses from design professionals. Third parties may now recover damages from design professionals regardless of whether the design professional has any contractual obligation. Though the standard of care and other requirements for proof of a building designer's negligence remain, they have effectively been reduced by the validation of methodologies that appear to be counter to the designation of the architect and the engineer as professionals. Much of the change in the standard of care could also be attributed to the initiative of the Architectural Institute of America's proactive stance in advocating for the ambiguous standard of sustainability in design. By advocating and promoting sustainability, design professionals might find that they are accountable for elements in the design that are outside of their control. If the performance of a building does not meet the expectation of the client or that of anyone who relied on the sustainable promises attached to a building design (such as LEED certification), then the sustainable expert could find that they will be responsible for the difference in costs.

Requiring design professionals to make and validate predictions of the energy performance or sustainability of a building might be considered extreme considering the complex nature of the design and construction process. Predictions or promises made relative to the energy performance of a building might not surface until years after a building has been built. The building performance is often dependent on occupancy use and maintenance of facilities.

Interestingly, design liability and sustainable design practices parallel one another in respect to how they are currently being approached. While the effort to combine sustainable design methodologies into one cogent platform that applies to all buildings is waning somewhat; it seems the fact that all buildings should not be treated the same is still lost on proponents of building design rating systems. It appears that many design professionals have invested much more than the cost of certification. Depending on the outcome of the Gifford lawsuit and similar challenges, the realization that building design rating systems are not always the best approach for all buildings may come too late for many supposed green designs.

With the exponential growth in human population and the impact that modern humanity can have on the landscape of the planet, there is a real concern that nature will not have the ability to repair itself if many of the exploits of human beings are not somehow reversed. Of those exploits, the design and construction of buildings and communities that use the planet's resources have a considerable influence. The debate over the effectiveness of building design rating systems should be a stern reminder to building design professionals that even the best intentions can lead to unintended consequences. Similar to how difficult it is to reverse the effects on the environment, the effects on the design process and the design community may prove equally as difficult to correct.

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