



Building Green Is Here To Stay – But So Are The Problems

“Green” construction is becoming commonplace in the United States, and in this region. Since 2005, the value of green building construction has increased five fold to an estimated \$49 billion.

Increasingly, large institutions, the federal government, and municipalities are requiring that new buildings, and substantial renovations to existing buildings, achieve certain environmental benchmarks. These requirements are often supported through the award of federal and state tax credits, and other financial incentives offered to developers.

There can be little doubt that the social and economic pressure to develop environmentally sensitive buildings will persist.

Yet, with the introduction of green building standards come new (and some old) legal problems. A good example is found in the recent case of *Shaw Development v Southern Builders*. In that case, a developer of a new green condominium building sued its contractor for damages because the building did not achieve the LEED Silver certification requirement referenced in the contract. As a result of the alleged non-compliance, the developer lost tax credits valued at \$635,000. The contractor defended the claim on the theory that the LEED certification was not part of the specification, and that the loss of tax credits was a “consequential damage” otherwise waived by the parties under the AIA standard contract agreed to by the parties.

The *Shaw* case settled prior to trial. However, the nature of the claims underscore that it is important for parties involved in the green construction process to understand the legal risks inherent in that process. These risks include:

1. Identifying in the construction contract the exact green standard to be achieved and the mechanism through which the standard will be achieved;
2. Identifying in the construction contract the party responsible for achieving the green building standard. While many standard form construction contracts carefully define the respective roles of the architect, contractor, and owner, many proprietary contracts do not. Depending on the green building standard to be achieved, there can be substantial “gray areas” as to the party responsible for achieving green status, which can lead to conflict if that standard is not achieved;
3. Reviewing the applicable green standard and determining whether it is a “performance” specification or not. It is one thing to define a green standard in terms of “points achieved” (the formula used, for example, under the LEED criteria). It is an entirely different matter if the applicable green standard is defined in terms of a building actually achieving certain “performance” levels, as in its mechanical, electrical, and energy profiles. Such performance criteria must be very carefully evaluated by the parties so that it is clear who is responsible if the building does not perform as required;
4. The marketing or promotion of the building should be carefully developed so that “promises”, “guarantees”, or “warranties” of environmental performance are not inappropriately made.



Building green is a relatively new phenomenon, but it is here to stay. Parties involved in the green building process, including developers, contractors, and design professionals should carefully assess their respective roles, and the risks before engaging in the green building process.



Andrew B. Cohn is a principal in the Construction Law group. He handles complex construction claims, litigation, arbitration and mediation for owners/developers, contractors, design professionals, subcontractors and suppliers. His practice includes negotiation and drafting of construction contracts and other construction-related agreements. You can reach Andy at 610.941.2549 or by email to acohn@kaplaw.com.

Paralegal News

Wendi Kapustin, a Planning Specialist in the Land Use, Zoning & Development group, spoke at a seminar presented at the Pennsylvania Planning Association's Annual Conference in King of Prussia on October 5, 2009 on the topic of "Town Center Development in Southeastern Pennsylvania." Ms. Kapustin's practice consists of analysis of zoning ordinances, preparation of ordinance amendments, zoning applications, zoning challenges, court appeals and related actions, and legal research of zoning-related issues. She is also on the Upper Dublin Township, Montgomery County Planning Commission and has over 20 years of zoning related experience.

Lisa LaPenna, a Paralegal in the Litigation group, and Chair of the Mentoring Committee of the Montgomery County Paralegal Association, spoke to the students at Manor College on November 5, 2009 about the paralegal profession.



CONGRATULATIONS

Deborah Arbuckle, a Paralegal in the Litigation and Land Use groups, who is the First Vice President on the Board of Directors of the Montgomery County Paralegal Association, has accepted the Board's appointment as Primary Representative to the National Federation of Paralegal Associations, Inc. Deborah also serves as Chair of the Montgomery County Paralegal Association's Community Outreach Committee.

Lisa LaPenna, a Paralegal in the Litigation group, biked 150 miles the weekend of October 2, 2009 to help raise funds for Multiple Sclerosis. Lisa has been participating in the "Bike MS: City to Shore Ride" every year for the past 7 years as a member of Team Easy Riders. This year the team raised over \$25,000, which will help 11,000 local people living with MS. Lisa also rode in the TD Bank Five Boro Bike Tour which promotes and encourages bicycling and bicycle safety through education and events, as well as the TD Bank Bike Philly, for the 3rd year, which supports the Bicycle Coalition of Greater Philadelphia and the Police Athletic League. Lisa keeps those wheels turning for great causes!

Attorney News

☛ **Neil Stein and Ameer Farrell** of the Land Use group will be presenting a program on "Incentives and Risks in Green Building – How to protect yourself when entering into a contract on a LEED Certified project" on February 24, 2010 at the Associated Builders and Contractors' Training Room, 430 West Germantown Pike, East Norriton, PA from 4:00 p.m. – 5:30 p.m. The cost is \$45.00, payable to Associated Builders and Contractors. Both Ameer and Neil have extensive experience in construction and real estate contracts. **If you are interested in attending you can register online at www.abcsepa.org or contact Bonnie Vandenberg at 610.941.2574 (gvandenberg@kaplaw.com) for a registration form.**

☛ **Barbara Anisko**, a principal in the Commercial Litigation and Land Use groups, is the Course Planner for a new course offered by the Pennsylvania Bar Institute on "Your First Bench Trial in a Commercial Case." The course will be presented in Philadelphia, Pittsburgh and Mechanicsburg and will cover not only the basics, but also the subtleties of trying a commercial case before a judge. Ms. Anisko has significant lead counsel experience in matters involving commercial, real estate transaction, land development, land use and zoning disputes, eminent domain and condemnation claims, constitutional property rights claims, and claims against state, county and municipal governments and agencies.

☛ Four principals of Kaplin Stewart were presenters at the Pennsylvania Bar Institute's 13th Annual Real Estate Institute in Philadelphia on December 3 and 4, 2009. **Barbara Anisko** presented "Limitation of Remedies Clauses in Real Estate Contracts . . . and Their Potential Consequences," **Robert Korn** presented "How to File and Defend a Mechanics' Lien," **Maury Reiter** presented "Getting Kicked While You're Down! Tax Aspects of Real Estate Workouts," and **Neil Stein** presented "Ancient Principles for Future Land Use Battles."

☛ **Maury Reiter**, Managing Principal, spoke at the September meeting of the North Penn Chapter of the Institute of Management Accountants on "Federal Income Tax Considerations in Debt Workouts." Mr. Reiter's practice involves a full range of legal representation and counseling to individuals, closely held businesses, professionals and investment entities. He utilizes his experience and understanding of financial issues obtained in his prior profession as a practicing CPA to provide additional insight to, and understanding of transactions. Mr. Reiter is a regular lecturer on various legal and tax-related topics on behalf of State CPA Societies and the Pennsylvania Bar Institute.

☛ **Dirk Simpson and Maury Reiter** of the Tax Law group, made presentations to Stewart Title Guaranty Company on November 4, 13 and 19, 2009 in Wilkes Barre, Camp Hill and Plymouth Meeting, Pennsylvania on "Taxes in the New Economy."

☛ **Barry Furman**, a principal in the Corporate & Business Planning group, spoke to the financial planners at Vantage Point Bank in Ft. Washington, PA on November 13, 2009, on the subject of Shareholder Disputes and Business Continuity.

☛ **Josh Quinter**, a member of the Construction Law group, was invited to speak at the 41st Annual Metal Building Contractors & Erectors Association's national conference in San Antonio, Texas in February 2010. Mr. Quinter will deliver a presentation focusing on project planning and ensuring payment in difficult economic times to members from across the country.

Our attorneys are always available to speak to your industry group on industry related or employment issues. Please visit our website www.kaplaw.com to contact an attorney directly or contact Bonnie Vandenberg at 610.941.2574 (gvandenberg@kaplaw.com) to schedule a speaking engagement.



Attorney Spotlight

This month, Kaplin Stewart shines the spotlight on Dirk Simpson, an associate in the business transactional and estate planning groups. Dirk counsels clients on the formation, operation, succession and sale of their closely-held businesses. In addition, he drafts numerous wills and trusts every year and occasionally finds himself in Orphans' Court, where he is either defending or attacking the actions of an executor or trustee, or clarifying the uncertain legal mumbo-jumbo in an estate planning document (of course, not present in Kaplin Stewart's documents).

At a young age, for no particular reason, Dirk decided to become a tax lawyer and, after Colgate University, followed that dream through three years of law school at Villanova University followed by a fourth year in Villanova's graduate tax program.

But the full story began many years earlier. Dirk was born and raised in the middle of upstate New York where the weather is wonderful, relative to the North Pole. Dirk was desperate to escape the relentlessly gray skies, lake effect snows and Canadian jet stream. Villanova Law seemed as good a solution as any, and Dirk's fate was sealed when the letter of admission arrived. He also failed to apply to law school in Florida or California.

However, through the clarity of

hindsight, Dirk recognizes the wisdom in attending Villanova. For it was in law school, well, actually the local bar down the street from the law school, that Dirk first met his future wife, Colleen. Together, they studied for and passed the bar exam (although one of them scored more points on the essay portion, through sheer luck as Dirk contends, and occasionally still taunts the other with that meaningless achievement).

Dirk and Colleen live in Bryn Mawr with their two children: Mia (who is 3 ½) and their newest arrival, Bree (who is 4 months). With young children, life is busy but rewarding. A day at the office is often followed by a hard night on the home front dealing with

bath time, bedtime stories and bad behavior. And when the day is finally done, Dirk never hopes to sleep like a baby, because that would mean waking up at 3:20 a.m.

Dirk lectures frequently to his three year old on a variety of subjects. He also speaks frequently for professional organizations such as state CPA accreditation boards on various tax, estate planning and other exciting topics. He even authored a real page-turner, "My Will Book," an instructional book on estate planning which is distributed nationally through Barnes & Noble. He volunteers his time on the Board of Bryn Mawr's Ludington Library, a place his daughter Mia loves to visit, second only to the playground out back.



Dirk Simpson

ESTATE ADMINISTRATION & PLANNING ATTORNEYS

Barry A. Furman
610.941.2529

Maury B. Reiter
610.941.2476

Dirk M. Simpson
610.941.2544

CORPORATE & BUSINESS PLANNING ATTORNEYS

Scott C. Butler
610.941.2560

Matthew A. Cosenza
610.941.2545

Barry A. Furman
610.941.2529

Maury B. Reiter
610.941.2476

Dirk M. Simpson
610.941.2544

William K. Stewart
610.941.2555

Do You Know –

that William Penn's land plan for Philadelphia was not followed. In 1682, Penn laid out a land plan for Philadelphia consisting largely of 1 and ½ acre lots located between the Delaware and Schuylkill Rivers oriented "inward" toward a 10-acre central square at the intersection of High (now Market) and Broad Streets. However, by 1700, the Schuylkill River side of the town was virtually vacant and, by 1703, 43 of the 102 foot wide lots located along Front Street along the Delaware River had been subdivided into 102 lots. Many of these lots were less than 20 feet wide, while lots further inland were fewer but larger with some lots having 200 feet of street frontage. It wasn't until 1871, some 200 years later, when City Hall construction commenced, that Penn's land plan depicting Philadelphia as an inward facing town with a center square came to fruition.

Gregg L. Adelman, Land Use, Zoning & Development group (gadelman@kaplaw.com).

Kaplin Stewart is a member of:



