THE LAW OFFICES OF
KEVIN M. SMITH, P.C.

Kevin M. Smith, Esquire • ksmith@ksmithlawoffice.com

Kevin M. Smith Quoted in §11.19 Green Standard of Care

Green Buildings: Law, Contract and Regulation
§11.19 Green Standard of Care

Cite as: Britell, Green Buildings: Law, Contract and Regulation, (2015)

[1] – General

The standard of professional care for an architect is a negligence standard. In general, the architect is expected to exercise the care and diligence, which would be reasonably expected of an architect performing similar services for a similar project.[1]

It is important to note that while an architect or engineer performs services under a contract, most courts hold that breaches of that contract are measured by a standard of professional negligence.[2]

Presumably the same standard, and the same tests of performance, should apply to the green elements of the architect's design. However, given the emphasis on green construction and the financial and other pressures relating to – and resulting from – green design, both owner and architect should take care in describing the green standard of care in their agreement.

THE LAW OFFICES OF
KEVIN M. SMITH, P.C.

Kevin M. Smith, Esquire • ksmith@ksmithlawoffice.com

In some cases the architect may wish to be clear that the architect is not guaranteeing the green result (unless, in an unusual case, the architect is indeed doing so). For example, if the project team will seek a LEED Platinum certification, the architect may wish to state that the architect will be bound by the traditional standard of care and will use due professional care in the design of the project towards the goal – but the architect cannot guarantee that the design will achieve the Platinum rating.

While such a disclaimer may merely state the obvious, sometimes being too clear in negotiation leads to provisos and qualifications, which are problematic. The owner may wish to clarify that the architect's disclaimer does not mean that the architect will not exercise the highest standard of professional care – because the Platinum rating may be worth millions in tax credits, grants, or tax abatements – or in a reduced interest rate under a huge mortgage. What is the "highest standard" of professional care? How would that differ from the usual duty of professional care?

The result of such negotiations may be a contract clause which defines the duty of care by reference to the type of project and green rating, as follows:

Example W: "Standard of Care. Architect will provide its services pursuant to this Agreement in accordance with a standard of care appropriate to an architectural firm of similar experience and reputation designing a project in the City of New York of approximately the same size, complexity, schedule, and other characteristics intended to achieve a LEED Platinum rating."

The other side of this issue is that the architect should beware of claiming special expertise unless the architect truly has such expertise.

Even without using the "guarantee" word, if the architect holds itself out as especially capable in green design, the architect may be accepting a higher standard of care. The test would likely be one of fact and circumstance because few architects will knowingly sign agreements in which they explicitly claim greater green expertise than they have. However, if the architect's brochures and other promotional materials make claims of green expertise, and if the parties use form agreements with generic (or no) standard of care provisions, a judge or jury might hold the architect (for example) to a knowledge of LEED standards and procedures or knowledge of green code requirements higher than would apply to a design firm which did not make such claims.

It is difficult to discuss such cases in the abstract because the issues are fact-intensive and would depend on the claimed breach of duty, e.g., failure to achieve the LEED Platinum rating. It is sufficient to identify the issue and suggest that architects tailor claims of green knowledge in their promotional materials to their actual expertise.

[2] – Thoughts on the Evolving Standard of Care for Green Projects[3]

As owner-architect agreements or laws require the design of "green" buildings, the law is evolving in ways that may create foreseeable, but not yet litigated, issues in sustainable design. The core issue is how the architect's[4]

THE LAW OFFICES OF
KEVIN M. SMITH, P.C.

Kevin M. Smith, Esquire • ksmith@ksmithlawoffice.com

duty of care for professional services – typically defined by common law – may change when green services are part of the architect's scope of work.

While there is not yet case law, the evolving standard of care may well be higher than the ordinary, common law one because, as architects incorporate sustainable design practices in new projects, the standard of care will likely expand to include green design as the accepted baseline. As a matter of course, many owners now require their buildings to earn a particular green rating with the most popular being Leadership in Energy and Environmental Design (LEED).[5] In the interim, however, the architect and its counsel should anticipate this changing standard while the law is in what Supreme Court Justice Robert Jackson would deem a "zone of twilight."

In most jurisdictions an architect's standard of care is the common law standard for professionals – that is, the standard of a similarly-situated professional. For instance, Florida holds architects to a common law standard; the architect must exercise such "reasonable care, technical skill and ability, and diligence as are ordinarily required of architects in the course of their plans, inspections and supervisions during construction for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so."[6] The architect's services are thus compared to industry design practices in the same field and locale. However, when an architect undertakes to perform green services that are outside standard industry practice – e.g. to obtain a particular green rating or to satisfy a client's specific green criteria – the architect's services can go beyond the common law standard.

To avoid judicial interpretation, of course, the architect can negotiate a precise standard of care to be included in the owner-architect agreement.

The widely used, American Institute of Architects (AIA) Owner/Architect form agreements include a stated standard of care that mirrors the common law standard. For example, AIA Document B101-2007 SP states:

"The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project."[7]

Such provision avoids having the owner or architect, without discussion or negotiation, include a standard different from that of the common law.[8] The AIA text holds the architect to the skill of architects in a similar locality under similar circumstances. In short, this adapts the standard of care *to the design practice of the locale*.

However, even this AIA provision can import green design issues and, *without analysis*, raise the bar. The reason is that green practices may be changing in the specific locale.

If an architect performs green services in an area where the industry standard *is already incorporating* green practices (which could result from green legislation or clients' green requirements), a court might compare the

THE LAW OFFICES OF
KEVIN M. SMITH, P.C.

Kevin M. Smith, Esquire • ksmith@ksmithlawoffice.com

particular architect's services to those of architects performing green services in the same locale. To restate, *without expressing any green criteria*, the AIA text automatically compares the architect to others practicing in the locality on green projects.

Importantly, also, the AIA language itself could be viewed as imposing a *higher* standard, because the architect may be performing *emerging specialty* services and would thus be compared to a similarly situated specialist in that locale.

Since the unmodified AIA text may itself inadvertently hold the architect to the higher green standard of other architects performing green services, the architect should be aware of the sustainable design customs and practices of other local architects.[9]

An architect may be contracting, however, to perform a scope of green services in a locale where the industry standard is not yet green, In such a case the architect's green services may go beyond, perhaps far beyond, the local paradigm. For example, if the architect undertakes to design for LEED Platinum (even without warranting the result) and problems arise, the architect may be deemed to have accepted a much higher professional duty than that of local, not-yet-green architects.

Issues might also arise in a locale where there are numerous green rating choices, rather than a single dominant one (like LEED). What standard might apply in such a case?

As another case, if a contract requires the architect to design a green standard not well known in the locale (perhaps a foreign green standard to satisfy a foreign client), will the architect be at a higher risk of liability? Even if a court compares the architect's particular scope of services for a less popular rating system, what if the architect provided all similar services *except* the material differences from the local standard?

The foregoing questions illustrate the complex issues that can arise with evolving – and diverging – green services.

Another set of issues relates to an architect's obtaining – and publicizing – specialized expertise in green design. Man architects now qualify as LEED Accredited Professionals.[10] Note, of course, that architects are not required to have LEED accreditation in order to design LEED certified projects. By marketing itself as a LEED AP, does an architect impliedly assume a greater duty of care than architects who do not have such accreditation? Alternatively, even if such accreditation is not required to apply for a LEED rating, does an architect designing LEED projects assume increasing risk if that architect does *not* obtain LEED accreditation?

Case law develops slowly, and it will take time until courts (or perhaps legislature or regulatory agencies) provide answers to these questions. In the interim, architects – especially architects designing complex green projects – their counsel, and their professional liability insurers should think carefully how they define the architect's "green" standard of care in the owner-architect agreement because even the common law standard may impose higher duties than they would ordinarily anticipate.

THE LAW OFFICES OF
KEVIN M. SMITH, P.C.

Kevin M. Smith, Esquire • ksmith@ksmithlawoffice.com

[1] See, e.g., AIArchitect, "Architect's Responsibilities: Services and Standard of Care," (June 26, 2009), available at http:// (last visited Aug. 15, 2015).

[2] Note, also that in many cases – particularly involving breaches of very specific provisions of the owner-architect agreement – the calculation of damages will be similar whether described in tort or contract.

[3] This Section is derived and quotes from Smith, "A Design Professional's Standard of Care for Green Projects – The Twilight Zone", paper written in The Law of Green Buildings Course (2015), L.L.M. Program in Real Property Development, University of Miami School of Law, Adjunct Professor Peter S. Brittle, with the permission of the author.

[4] The term "architect" includes every licensed design or engineering professional.

[5] For further discussion of LEED, see § 2.02 *supra*.

[6] *Conklin v. Cohen, 287 So.2d 56, 61 (Fla. 1973)*

[7] AIA Document B101-2007 SP, Section 2.2, Architect's Responsibilities,

[8] ADA Document D503-2013, Guide for Sustainable Projects, p. 15.

[9] *Id.*

[10] See, e.g., discussion in § 2.02 *supra*.