

Where does the law stand on green construction in the U.S?

19 August 2021, by Amer Hamad Issa Abukhalaf



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The U.S has been actively trying to popularize green practices in the construction industry [for the past few decades](#). Many green programs have emerged to provide guidance for green construction, [such as LEED](#), which was developed by the [U.S. Green Building Council](#) (USGBC).

The LEED program principles have been [integrated into law and policy](#) at all levels of government, and in the majority of states. Green buildings are becoming fairly well-accepted by the different parties in the U.S construction industry, and they are rapidly growing [despite the challenges](#).

The fast growth of the green buildings market, at a pace [beyond the construction industry's capability in expertise and technology](#), left many people with expectations of a higher number of [legal disputes at U.S. courts](#), and some industry commentators even predicted a major [hit on the "Standard of Care"](#).

What is happening in U.S. courts?

Probably the [most noted lawsuit](#) in the green construction field was filed against the USGBC by the owner of the Gifford Fuel Savings. Mr. Gifford

claimed that the organization had committed fraud by creating unfair competition, false advertising, and deceptive trade practices. The basis of the claim was that [LEED-certified green buildings](#) aren't more efficient than the conventional energy options.

Whilst the [New Buildings Institute](#) claims that LEED buildings save 28% of total energy compared to the national average, Mr. Gifford published a private analysis showing that LEED buildings [are almost 30% less efficient](#) in energy spending. However, the \$100 million suit was eventually dismissed as the judge ruled in favor of USGBC.

Another famous [dispute that made it to court](#) was the case of Shaw Development vs. Southern Builders, where the owner filed a counter lawsuit against the general contractor, seeking \$635,000. Based on the contract on hand, the owner claimed that the general contractor was required to build a sustainable Silver LEED Certificated building. However, the building didn't meet the requirement of the [Silver LEED Certification](#) and as a result, lost the tax credits.

Even that the parties settled their conflicts out of court, this case made many firms pay more attention to the contractual requirements of contractors regarding LEED certification, and clearly stating any green construction expectations. This also showed that there is an opportunity for recovery when sustainable construction goes awry.

The real issue

While the majority of the parties involved in the construction industry are enthusiastic about reaching the green goals of construction, [many of them are still unfamiliar with it](#). Many definitions were provided for green buildings, but the definitions are found by many to lack specificity. For example, "resource-efficient" is a core element in green buildings that is yet to clearly be defined.

[Construction professionals](#) believe that it is the responsibility of the federal government to clarify this ambiguity, and they argue that the definition has to match not only the owner's needs, but also the regional circumstances. For example, a green building in Ohio may not be green in Arizona.

There are many question marks surrounding green construction and [who should ultimately decide](#) what the standard should be. On the other hand, [some lenders are requiring](#) a certain LEED rating, even that materials costs, industrial hygiene, construction techniques and LEED designers can greatly increase the project costs. But still, [it is unclear how to quantify](#) the damage if that rating isn't met, and who should be responsible for it, and how much should be paid as a result.

[LEED-certified buildings promise](#) productive employees that are healthier physically and mentally. Many tenants of green buildings have been trying to sue USGBC, as people aren't getting [the benefits that the certificate promises](#), while they pay higher rents to be in these buildings. The process of getting a LEED certification is very close to filling out a checklist, and achieving a LEED certification [doesn't necessarily guarantee](#) a green building. Also, tenants don't have any contract with USGBC, and even if the information they had received and the expectations they had didn't match up with what they found, they still [don't have the basis for](#) their claim against USGBC.

On the other hand, the research that supports USGBC promises or tenants' [claims is still lacking](#), but if future research actually comes out to support the claims of the tenants against USGBC, the lawyers of the tenants will have enough of a basis to go after USGBC. The litigation [will probably include](#) breach of contract, negligence and fraud.

What can be done

Many lawyers are [expecting more lawsuits](#) within green construction in the near future as the owners realize that a green stamp can translate into higher rents, tax breaks, and good public relations. And when design professionals and contractors fail to deliver, the [owners will seek a payback](#).

By going over the claims reported in green projects, it is noticeable that the problems reported mainly [relate to 3 major areas](#): energy savings, certifications, and incentive provisions. The true challenge here is to clearly identify the property damage, which now is being done on a case-by-case basis due to the [lack of legal experience and solid claims' history](#).

To effectively manage risks, it is crucial to pay great attention to contracts, as well as [negotiate any dispute resolution provision](#) they include. Also, the LEED objectives need to be incorporated and integrated into the contract documents. At the same time, from the USGBC side, green explanations should be clear as the tenants and owners are becoming knowledgeable about LEED, so they are [drafting flexibility within contracts](#) in order to cover the existing uncertainties.

Finally, to minimize the problems with tenants, the developers need to stop [characterizing a building as just "Green"](#); they need to be more specific about the products they are offering. And within the construction project, parties need to pay more attention to the details and exactly identify the responsibilities for each person in the project team [to achieve a particular LEED certification](#).

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More information: Amer Hamad Issa Abukhalaf, Legal Complications in U.S Green Construction, *Academia Letters* (2021). [DOI: 10.20935/AL2576](#)

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APA citation: Where does the law stand on green construction in the U.S? (2021, August 19) retrieved
29 January 2022 from <https://sciencex.com/news/2021-08-law-green.html>

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