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## Government "Green" Requirements and "LEEDigation"

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# **Zoning and Land Use Planning**

*Graham Grady, Patricia E. Salkin, Nicole Mueller, and Susan Herendeen\**

## **GOVERNMENT “GREEN” REQUIREMENTS AND “LEEDIGATION”**

### **I. Introduction**

#### **A. Mandates and Incentives Seek to Conserve Energy**

In the last decade, many state and local governments have responded to the threat of global warming and climate change by offering incentives to spur green construction and incorporating principles of efficiency and conservation into their building codes.<sup>1</sup> Buildings are crucial targets for environmentalists, because they consume large amounts of fossil fuels, like oil and natural gas and coal, which generate carbon dioxide, the most widespread greenhouse gas contributing to global warming.<sup>2</sup> Nationwide, about 40% of carbon dioxide emissions came from buildings, significantly more than the 27% generated by the transportation sector.<sup>3</sup> In response, green buildings seek to use land and energy ef-

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<sup>1</sup>Salkin, *Cooperative Federalism and Climate Change: New Meaning to “Think Globally-Act Locally,”* 40 *Envtl. L. Rep. News & Analysis* 10562, 10565 (June, 2010) (“Municipalities are collectively the largest government consumer of buildings, infrastructure and products, and together they have the potential to make significant progress in the implementation of strategies to slow climate change.”).

<sup>2</sup>Green Building: Frequently Asked Questions, United States Environmental Protection Agency, available at <http://www.epa.gov/greenbuilding/pubs/faqs.htm>.

<sup>3</sup>See, *Buildings Energy Data Book*, U.S. Department of Energy, available at <http://buildingsdatabook.eren.doe.gov/ChapterIntro1.aspx?>

ficiently, conserve water, improve indoor air quality, use recycled and renewable materials in the construction process and recycle construction debris.<sup>4</sup>

Since 2007, the federal government has required its agencies to use green building techniques to improve energy efficiency and water usage in new construction and major renovations of federally owned or leased buildings.<sup>5</sup> The Obama administration included \$20 million for federal and state green building projects in its stimulus package, the American Recovery and Reinvestment Act of 2009. In February 2011, the President announced the Better Building Initiative, which seeks to make commercial building 20% more energy efficient by 2020, and calls on Congress to redesign tax deductions and offer more government-backed loans to private businesses that retrofit existing buildings.<sup>6</sup> The High Performance Buildings database compiled by the U.S. Department of Energy offers 127 examples of green buildings, including office and apartment complexes, schools and government facilities that are notable for their environmental features.<sup>7</sup> In an effort to lead by example, the department also touts a zero-energy office building on the campus of its National Renewable Energy Laboratory in Golden, Colorado,

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<sup>1</sup>#1; Transportation Energy Data Book, U.S. Department of Energy, available at <http://cta.ornl.gov/data/download29.shtml>.

<sup>4</sup>Howe, Overview of Green Buildings, 41 *Envtl. L. Rep. News & Analysis* 10043.

<sup>5</sup>Exec. Order No. 13423, signed by President George W. Bush on Jan. 24, 2007, available at <http://www.epa.gov/greeningepa/practices/eo13423.htm>.

<sup>6</sup>Press Release, President Obama's Plan to Win the Future by Making American Businesses More Energy Efficient through the "Better Buildings Initiative," The White House, (Feb. 3, 2011), <http://www.whitehouse.gov/the-press-office/2011/02/03/president-obama-s-plan-win-future-making-american-businesses-more-energy> (President Obama's proposal calls on Congress to 1) redesign tax incentives for commercial building retrofits, replacing a tax deduction with a tax credit, 2) offer more financing for commercial retrofits through loans from the Small Business Administration and the U.S. Department of Energy, 3) offer grants to state and local governments that streamline regulations to encourage private investment in energy efficiency, 4) challenge corporations and universities to make their organizations more energy efficient, and 5) provide training in energy auditing and building operations.).

<sup>7</sup>High Performance Buildings Database, U.S. Department of Energy, available at <http://eere.buildinggreen.com/>.

which consumes 50% less energy than a traditional office building, and generates its energy with solar panels.<sup>8</sup>

### **A. Energy Performance of Green Buildings is Disputed**

As they seek to move the market toward green building, advocates suggest that environmentally-conscious construction costs more up front, but saves money over time, through lower operating costs.<sup>9</sup> With the green building industry still in its infancy, reliable data is hard to come by.<sup>10</sup> The United States Green Building Council (“USGBC”)—which created the most widely used green building rating system in the nation<sup>11</sup>—claims that building green costs 2.5% more upfront, but offsets the additional cost in five to eight years through energy savings.<sup>12</sup> However, critics charge that green buildings do not always perform as advertised, in part because energy management is only one of five categories used to award points in the Leadership in Energy and Environmen-

<sup>8</sup>Jim Witkin, For a Premier Lab, a Zero-Energy Showcase, *The New York Times*, July 6, 2010, available at <http://green.blogs.nytimes.com/2010/07/06/for-a-premier-lab-a-zero-energy-showcase/>.

<sup>9</sup>Green Building: Frequently Asked Questions, United States Environmental Protection Agency, available at <http://www.epa.gov/greenbuilding/pubs/faqs.htm>.

<sup>10</sup>See, e.g., Ditta, Leading the Way in Unconstitutional Delegations of Legislative Power: Statutory Incorporation of the LEED Rating System, 39 *Hofstra L. Rev.* 369 (Winter 2010), FN 33, citing Bowmar and Wireman, Hopping on the Green Wagon: How Corporations Can Overcome Potential Political and Legal Pitfalls Associated with Sustainable Incentives, 76 *U. Cin. L. Rev.* 1479, 1489 (Summer 2010) (Upfront construction costs average about 2% above traditional construction of similar buildings, according to a study of newly constructed green buildings in California.); Hirokawa, At Home With Nature: Early Reflections on Green Building Laws and the Transformation of the Built Environment, 39 *Envtl. L.* 507 (Summer 2009), FN 225 (Some estimates put the cost of green building materials at 3–5% above comparable market prices, while others suggest the cost is negligible.).

<sup>11</sup>Salkin, *American Law of Zoning* § 36:11 (5<sup>th</sup> Ed.) (The LEED certification system created by USGBC is the most widely used in the green building industry; other rating systems include The Green Globes program developed by the Green Building Initiative, and the Energy Star program, which is jointly administered by the U.S. Environmental Protection Agency and the U.S. Department of Energy.).

<sup>12</sup>Greening Buildings and Communities: Costs and Benefits, United States Green Building Council, available at [http://www.usgbc.org/DisplayPage.aspx?CMSPageID=77#usgbc\\_publications](http://www.usgbc.org/DisplayPage.aspx?CMSPageID=77#usgbc_publications).

tal Design (“LEED”) certification system.<sup>13</sup> Further, until 2009, LEED relied on pre-construction forecasts alone; administrators responded to criticism by rewriting their rules to require a five-year post-certification review of utility bills.<sup>14</sup> The matter came to a head when the owner of a heating system and repair company sued USGBC in federal court in New York, alleging that USGBC engages in “greenwashing” when it claims that LEED-certified buildings, on average, are 25–30% more energy efficient than non LEED-certified buildings.<sup>15</sup> Although the details are in dispute, and the lawsuit remains pending, LEED sponsors and critics agree that a building cannot be called green if it is not energy efficient.<sup>16</sup>

### **B. LEED Certification System Drives the Debate**

As the green building movement gathered steam, federal, state and local governments began requiring LEED certification for new construction and major renovations funded with public money.<sup>17</sup> Incentives designed to make LEED certification more attractive to private builders followed, often taking the form of tax credits, or less expensive options like speedy permit processing, refunds of permitting fees and

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<sup>13</sup>Henry Gifford, A Better Way to Rate Green Buildings, *Northeast Sun*, Spring 2009, available at [http://www.nesea.org/uploads/universe/docs/wysiwyg/documents/nesea-sp09\\_Green\\_Buildings.pdf](http://www.nesea.org/uploads/universe/docs/wysiwyg/documents/nesea-sp09_Green_Buildings.pdf).

<sup>14</sup>Press Release, USGBC Tackles Building Performance Head On, U.S. Green Building Council, Aug. 25, 2009, available at <http://www.usgbc.org/Docs/News/BPI082509.pdf>.

<sup>15</sup>Gifford v. U.S. Green Bldg. Council, 2011 WL 4343815, amended complaint filed Feb. 7, 2011 (S.D. N.Y. 2011), available at <http://www.greenbuildinglawupdate.com/uploads/file/gifford%20amended%20complaint.pdf> (For updates on this litigation, see *The Green Real Estate Law Journal*, at <http://www.greenrealestatelaw.com/2011/04/usgbc-files-motion-to-dismiss-henry-giffords-amended-complaint/>, and *The Green Building Law Update*, at <http://www.greenbuildinglawupdate.com/2011/02/articles/legal-developments/giffords-leed-lawsuit-takes-new-shape/>).

<sup>16</sup>Howe, Overview of Green Buildings, 41 *Env'tl. L. Rep. News & Analysis* at 10044.

<sup>17</sup>Delaney, Abrams, and Schnidman, Handling the Land Use Case § 42:5 (1<sup>st</sup> Ed.), Local regulation; Public Policy Search, United States Green Building Council, available at <http://www.usgbc.org/PublicPolicy/SearchPublicPolicies.aspx?PageID=1776> (USGBC maintains a searchable database of federal, state and local green building programs that use the LEED certification system.).

waivers to height and density limitations.<sup>18</sup> Participating builders project an image of environmental responsibility, to attract tenants willing to pay premium rents to live or do business in a green building.<sup>19</sup> Due to widespread government backing, some builders describe the industry as “recession proof.”<sup>20</sup>

LEED has four certification levels—certified, silver, gold and platinum—which are achieved by earning points based on a variety of environmental factors.<sup>21</sup> To date, 14 federal agencies and departments, 34 state governments, 36 counties, 138 cities and 28 towns have incorporated the LEED rating system into their statutes, ordinances and executive

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<sup>18</sup>Public Policy Search, United States Green Building Council, *supra* note 17 (Common state-sponsored incentives include fee reductions and waivers, free consultation and promotional services, free technical assistance, grants, low interest loans, tax breaks and tax credits; common incentives offered by local government include density bonuses, expedited permitting, fee reductions and waivers, free technical assistance, grants, tax credits and tax breaks.).

<sup>19</sup>Fox, *A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards*, 28 Va. Env'tl. L.J. 299, 327 (2010); Mireya Navarro, *Some Buildings Not Living Up to Green Label*, *The New York Times*, Aug. 31, 2009, available at <http://www.nytimes.com/2009/08/31/science/earth/31leed.html>.

<sup>20</sup>See, e.g. Chris Cheatham, *As the Green Building Industry Grows, So Will Green Building Claims*, *Construction Briefings* No. 2009-10; Fox, *A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards*, 28 Va. Env'tl. L.J. 299, 309 (2010) (Despite the economic downturn, plans to convert Empire State Building in NYC and Willis Tower in Chicago into green buildings are still in the works.); Jones and Jessica V. Perro, *Risk Allocation and Liability Prevention in Green Building*, *Building Washington, The Voice of Construction in Washington, D.C.* Vol. 26, No. 1, at 20 (2011) (Green building continued to thrive despite the stall of the general construction industry.).

<sup>21</sup>Geoffrey M. White et al., *Green Building Rating Systems and Green Leases*, 19-21 (J. Cullen Howe and Michael B. Gerrard, eds., *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing*, American Bar Association, 2010.) (LEED 2009, also known as LEED V3, awards up to 100 points: 26 points for sustainable sites, 10 points for water efficiency, 35 points for energy and atmosphere, 14 points for materials and resources, 15 points for indoor environmental air quality, six points for innovation and design. Projects that earn 40–49 points obtain the LEED Certified designation, projects that earn 50–59 points obtain the LEED Silver designation, projects that earn 60–79 points earn the LEED Gold designation, and projects that earn 80–100 points obtain the LEED Platinum designation.).

orders.<sup>22</sup> So far, more than 7,885 green buildings have been LEED certified, and another 23,232 are in the process of certification.<sup>23</sup> Although industry observers have predicted that green building standards will prompt “LEEDigation,” there are few reported cases,<sup>24</sup> with the litigation to date revolving around the failure to sufficiently define risk and liability in a green building contract,<sup>25</sup> and whether standards in local energy conservation codes can be stricter than those set by the federal government.<sup>26</sup> Construction attorneys predict that green building litigation will grow,<sup>27</sup> with contract disputes revolving around a failure to achieve green building certification and defects that limit energy performance after

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<sup>22</sup>LEED Initiatives by State, United States Green Building Council, available at <http://www.greenbuildingcouncil.com/ShowFile.aspx?DocumentID=5030> (updated March 2, 2010).

<sup>23</sup>LEED Projects & Case Studies Directory, United States Green Building Council, available at <http://www.usgbc.org/LEED/Project/RegisteredProjectList.aspx> (last visited July 15, 2011).

<sup>24</sup>See, e.g. Fox, A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards, 28 Va. Envtl. L.J. at 339 (2010); Howe, Overview of Green Buildings, 41 Envtl. L. Rep. News & Analysis at 10048 (Summer 2011).

<sup>25</sup>So. Builders, Inc. v. Shaw Dev. LLC, No. 19-C-07-11405 (Somerset Co. Md. Cir. Ct. filed Feb. 7, 2007) (Widely believed to be the first green building lawsuit, this contract dispute revolved around a 23-unit condominium project’s failure to qualify for \$635,000 in green building tax credits. The case did not result in judicial guidance to the industry, as the parties settled out of court, but it illustrates the need to clearly define risk and liability, rather than rely on standard-form contracts that have no special provisions related to the unique challenges of green building.).

<sup>26</sup>AHRI v. City of Albuquerque, No. 08-cv-00633-MV-RLP, (D.N.M. filed Sept. 30, 2010) (Federal district court held that city energy conservation code was preempted by federal regulation because the city set higher standards for heating and air conditioning equipment than standards in federal law; enforcement of city code enjoined.); BIAW v. Washington State Building Code Council, No. C09-5633RJB (W.D. Wash. filed Feb. 7, 2011) (Similar preemption claim challenging amendments to the Washington State Energy Code, brought by the Building Industry Association of Washington, dismissed by summary judgment.).

<sup>27</sup>Cheatham, As the Green Building Industry Grows, So Will Green Building Claims, *supra* note 20; Shari Shapiro and Chris Cheatham, Emerging Legal Issues in Green Construction, 361 (J. Cullen Howe and Michael B. Gerrard, eds., The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing, American Bar Association, 2010); Stanley P. Sklar, Risks, Damages and Alternative Dispute Resolution in Green Construction, Practicing Law Institute Order No. 23011, July 15, 2010, at 310.

construction is complete.<sup>28</sup> Already, the reasonable standard of care for design and construction in green building may have been heightened, at least in contracts with special provisions that define objectives or warranty obligations.<sup>29</sup> And with increased globalization in real estate ownership, development and finance, an international entity may seek to use a non-USGBC standard to achieve green building compliance in the United States.<sup>30</sup> Given the widespread

<sup>28</sup>Cheatham, *As the Green Building Industry Grows, So Will Green Building Claims*, *supra* note 20; Rock, *Green Building: Trend or Megatrend?*, 65-OCT Disp. Resol. J. 72 (Oct. 2010) (Expects claims to revolve around breach of warranty if expected performance of a green building is not realized, audit-failure if noncompliance results in de-rating of a project or a certification level less than anticipated, forfeiture if delays result in loss of grants or tax incentives or credits, lack-of-cooperation if stakeholders in a project do not properly coordinate their efforts, misrepresentation if marketing materials amount to “greenwashing” and lead to legal claims by investors, lenders and buyers.); *Bain v. Vertex Architects*, 2010LO12695 (Cook Ct. Cir. Ct. Ill. filed Nov. 4, 2010), available at <http://www.greenrealestatelaw.com/2011/03/bain-v-vertex-architects-firm-failed-to-diligently-pursue-and-obtain-leed-for-homes-certification-from-usgbc/> (Home buyer alleges breach of architects agreement and breach of construction contract after renovation of a farmhouse built in 1883 failed to meet LEED for Homes certification.); *Chesapeake Bay Foundation, Inc. v. Weyerhaeuser Co.*, 8:11-cv-00047-AN (Montgomery Co. Md. Cir. Ct. filed Dec. 8, 2010, available at <http://www.greenbuildinglawupdate.com/2011/03/articles/legal-developments/first-leed-platinum-building-at-risk-of-collapse/> (Breach of contract case alleges use of defective products in LEED-Platinum certified building that is at risk of collapse.); *Gidumal v. Site 16/17 Development LLC*, No. 105958/10 (Sup. Ct. N.Y. 2010) (Condominium owner alleges breach of contract, construction defect, and fraud, arguing that LEED-Gold rated building in New York City, which had been promoted as a cutting-edge project with a green roof and geothermal heating and cooling system, resulted in additional costs because it did not maximize energy efficiency.).

<sup>29</sup>See, e.g., Christopher, *Green Development Opportunities and Risks*, 82 Wis. Law 6, 8–9 (2009) (In 2008, the American Institute of Architects changed its code of ethics and standard contract, committing the institute and its architects to becoming “experts in sustainability.”); David J. Hatem and Donovan Hatem, *Green and Sustainable Design Part I: Professional Liability Risk and Insurability Issues for Design Professionals*, PLI Order No. 23011, 2010 PLI Real Est. L. Prac. Course Handbook Series 186 (2010); G. William Quatman et al., *White Paper: Managing the Risks and Embracing the Benefits of Going Green*, AIA Tr. 13 (Feb. 2008).

<sup>30</sup>See, BREEAM, available at <http://www.breeam.org/> (A design and assessment tool for sustainable buildings used in the United Kingdom.); The International Green Construction Code, available at <http://www.iccsafe.org/cs/IGCC/Pages/default.aspx> (The International Code Council, a membership organization that promulgates model codes for building safety, fire prevention and energy efficiency in commercial and residential



adoption of green building standards, two main legal questions that will have an impact on public policy are emerging: 1) Whether lawmakers have the authority to delegate power by incorporating the LEED certification system into building codes,<sup>31</sup> and 2) Whether the government is able to require compliance or prepared to rescind incentives if buildings do not meet green standards.<sup>32</sup>

## II. NON-DELEGATION DOCTRINE

### A. LEED as *De-Facto* Lawmaker

Some observers argue that incorporation of LEED certification standards into building and tax codes has turned the USGBC into a *de facto* lawmaker, a situation that could make lawmakers susceptible to constitutional challenge under the non-delegation doctrine.<sup>33</sup> The USGBC, a membership organization of contractors, builders, manufacturers and government entities, has helped create a market for green building through public outreach and professional training, and its Green Building Certification Institute (“GBCI”) administers the LEED program.<sup>34</sup> To skeptics, the widely-adopted rating system has become a form of “shadow government,” because green building standards are drafted, approved and administered by a private company that is neither under government control nor accountable to the

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buildings, recently completed its first International Green Construction Code.).

<sup>31</sup>Ditta, Leading the Way in Unconstitutional Delegations of Legislative Power: Statutory Incorporation of the LEED Rating System, 39 Hofstra L. Rev. 369 (Winter 2010); Howe, Overview of Green Buildings, 41 Env'tl. L. Rep. News & Analysis 10043 (Jan. 2011).

<sup>32</sup>Les Lo Baugh, LEED Green Building Incentives, Practicing Law Institute Order No. 16007, March 2008, at 29; Vyas and Gentilcore, Growing Demand for Green Construction Requires Legal Evolution, 30 SUM Const. L. 10, 20 (Summer 2010).

<sup>33</sup>Ditta, Leading the Way in Unconstitutional Delegations of Legislative Power: Statutory Incorporation of the LEED Rating System, 39 Hofstra L. Rev. 369, 385 (Winter 2010) (“The Constitution limits the powers granted to the government by the people and, therefore, a legislature must have some constitutional basis for shifting its lawmaking authority to another branch or body in order to stay within the bounds of constitutionality.”).

<sup>34</sup>Green Building Certification Institute, available at <http://www.gbci.org/homepage.aspx>.

electorate.<sup>35</sup> Further, incorporation by reference could lead to antitrust claims, because a government endorsement of only one set of standards, by a private group that dominates the green building market, could make it impossible for other certification systems to compete, and shut out makers of products that are not approved by the LEED system.<sup>36</sup>

The situation makes it difficult for the public to know if environmental claims about green buildings are true and verifiable, particularly when marketing claims are made by a third-party certifier, as noted in a 2010 update of Green Guides promulgated by the Federal Trade Commission (“FTC”).<sup>37</sup> Although the FTC does not regulate third-party certification systems, it recommends that marketers use clear and prominent language limiting their claims to a particular attribute for which they have substantiation.<sup>38</sup> In *Gifford v. U.S. Green Building Council*, the New York-based owner of Gifford Fuel Savings takes aim at green building marketing claims, alleging that the USGBC made fraudulent statements in a press release that claims LEED-certified

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<sup>35</sup>Michael Liu, *The Shadow Government: With little public oversight, the organization that invented the LEED System is remaking an industry*, ArchitectureBoston, Summer 2011, available at <http://www.architects.org/architectureboston/articles/shadow-government> (Liu challenges the propriety of a private group regulating the building industry, but also notes that government regulation has not been without its troubles, as the Government Accountability Office in 2010 obtained Energy Star certification “for several bogus products including an ‘air purifier’ constructed of a space heater with fly paper and a feather duster attached.”).

<sup>36</sup>See, e.g. Fox, *A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards*, 28 Va. Envtl. L.J. at 339 (2010); J. Cullen Howe, *Municipal Efforts to Improve Building Energy Efficiency*, Practising Law Institute Order No. 29217, March 3, 2011, at 403–06.

<sup>37</sup>The FTC’s Green Guides, Federal Trade Commission, available at <http://www.ftc.gov/opa/reporter/greengds.shtm>; see also, *Federal Trade Commission Proposes Revised Green Guides*, available at <http://www.ftc.gov/opa/2010/10/greenguide.shtm>.

<sup>38</sup>Green Guides: Summary of Proposal, Federal Trade Commission, available at <http://www.ftc.gov/os/2010/10/101006greenguidesproposal.pdf>; see also, Tresa Baldas, *Claims of “Greenwashing” on the Rise*, *The National Law Journal*, June 10, 2009, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431255440&slreturn=1&hbxlogin=1> (An uptick in consumer interest in buying green has spurred a flood of green products in the market and a fresh crop of lawsuits in which companies are sued for inflating or misrepresenting the eco-friendly nature of their products.).

buildings are 25–30% more energy efficient than non-LEED buildings.<sup>39</sup>

In the lawsuit, which is pending in federal court, Gifford alleges that the USGBC-cited study of 121 LEED-certified buildings, by the New Buildings Institute (“NBI”) of Vancouver, Washington, actually shows that 29% of the LEED buildings in the NBI study use more energy than similar non-LEED buildings.<sup>40</sup> Gifford’s challenge prompted further study within the industry, and another independent review of the NBI data suggests that 28–35% of LEED buildings used more energy than their conventional counterparts, and also notes that performance of the LEED buildings did not correlate with the certification level of the buildings.<sup>41</sup> Similarly, a report by the National Institute of Building Sciences argued that certification systems might confuse or mislead policy makers and the public, because there is limited data available to correlate building performance with building standards.<sup>42</sup> Yet another study concluded that LEED certification standards are insufficient because the certification system awards too few points to systems that improve air

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<sup>39</sup>Gifford v. U.S. Green Bldg. Council, 2011 WL 4343815 (S.D. N.Y. 2011), amended complaint filed Feb. 7, 2011, available at <http://www.greenbuildinglawupdate.com/uploads/file/gifford%20amended%20complaint.pdf> (For updates on this litigation, see The Green Real Estate Law Journal, at <http://www.greenrealestatelaw.com/2011/04/usgbc-files-motion-to-dismiss-henry-giffords-amended-complaint/>, and The Green Building Law Update, at <http://www.greenbuildinglawupdate.com/2011/02/articles/legal-developments/giffords-leed-lawsuit-takes-new-shape/>.)

<sup>40</sup>Gifford v. U.S. Green Bldg. Council, 2011 WL 4343815 (S.D. N.Y. 2011), amended complaint filed Feb. 7, 2011, available at <http://www.greenbuildinglawupdate.com/uploads/file/gifford%20amended%20complaint.pdf> (For updates on this litigation, see The Green Real Estate Law Journal, at <http://www.greenrealestatelaw.com/2011/04/usgbc-files-motion-to-dismiss-henry-giffords-amended-complaint/>, and The Green Building Law Update, at <http://www.greenbuildinglawupdate.com/2011/02/articles/legal-developments/giffords-leed-lawsuit-takes-new-shape/>.)

<sup>41</sup>G.R. Newsham et. al., Do LEED-certified buildings save energy? Yes, but . . ., National Research Council Canada, August 2009, available at <http://www.nrc-cnrc.gc.ca/obj/irc/doc/pubs/nrcc51142.pdf>.

<sup>42</sup>Stephen Del Percio and Preston D. Koerner, State and Local Green Building Laws and Initiatives, 87 (J. Cullen Howe and Michael B. Gerard, eds., The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing, American Bar Association, 2010.).

quality, an area of increasing concern.<sup>43</sup> The debate prompted USGBC to revise its rating criteria, which had relied only on formulas to predict energy use, but now additionally requires five years of performance data after a building has been certified.<sup>44</sup> Notably, the challenge to LEED standards was launched in the private sector, and was not the result of government supervision or public input.<sup>45</sup>

### **B. LEED Incorporation Varies by Jurisdiction**

The LEED-certification system is part of the statutory framework endorsed by many government agencies, but the extent to which it has been incorporated varies by locality.<sup>46</sup> Several states have adopted the LEED certification system wholesale, typically requiring that large-scale new construction projects funded by the state meet the LEED-Silver standard, including: Arizona,<sup>47</sup> Connecticut,<sup>48</sup> Maine,<sup>49</sup> Michi-

<sup>43</sup>Tristan Roberts, *New Report Criticizes LEED on Public Health Issues*, Environmental Building News, June 3, 2010, available at <http://www.buildinggreen.com/auth/article.cfm/2010/6/3/New-Report-Criticizes-LEED-on-Public-Health-Issues/>.

<sup>44</sup>Buildings Seeking LEED to Provide Performance Data: Energy and Water usage becomes a precondition of certification, United States Green Building Council, available at <http://www.usgbc.org/Docs/News/MPRs%200609.pdf>.

<sup>45</sup>Vyas and Gentilcore, *Growing Demand for Green Construction Requires Legal Evolution*, supra note 32, at 20 (Predicts that disputes regarding decertification or de-rating are likely, adding that statutes and regulatory provisions do not appear equipped to address issues that will arise if a green building does not perform as anticipated.).

<sup>46</sup>Philip L. Bruner and Patrick J. O'Connor, Jr., *Annotation, State and local incentives for sustainable development*, Bruner & O'Connor on Construction Law § 17:38.57; see also, Public Policy Search, United States Green Building Council, available at <http://www.usgbc.org/PublicPolicy/SearchPublicPolicies.aspx?PageID=1776> (USGBC maintains a searchable database of federal, state and local green building programs that use the LEED certification system.).

<sup>47</sup>State of Arizona, Exec. Order No. 2005-05, available at [http://www.governor.state.az.us/eo/2005\\_05.pdf](http://www.governor.state.az.us/eo/2005_05.pdf) (signed Feb. 11, 2005).

<sup>48</sup>State of Connecticut, Public Act No. 7432, available at <http://www.cga.ct.gov/2007/ACT/PA/2007PA-00242-R00HB-07432-PA.htm> (signed June 4, 2007).

<sup>49</sup>State of Maine, Executive Order, available at [http://www.maine.gov/v/tools/whatsnew/index.php?topic=Gov\\_Executive\\_Orders&id=21346&v=Article](http://www.maine.gov/v/tools/whatsnew/index.php?topic=Gov_Executive_Orders&id=21346&v=Article) (signed Nov. 24, 2003).

## ZONING AND LAND USE PLANNING

gan,<sup>50</sup> New Jersey,<sup>51</sup> Rhode Island,<sup>52</sup> South Carolina,<sup>53</sup> Washington<sup>54</sup> and Wisconsin.<sup>55</sup> Illinois<sup>56</sup> and Pennsylvania<sup>57</sup> mandate green building only for school construction projects, letting builders use the LEED certification system or comparable standards. California required LEED certification for all state-sponsored construction and renovation by executive order in 2004, but in 2010 adopted mandatory green building codes that impose green building requirements on all new construction, yet let builders get green certification from the state rather than USGBC, as desired.<sup>58</sup> Similarly, Colorado<sup>59</sup> and Maryland<sup>60</sup> initially required LEED certification for buildings constructed with state funding, but later

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<sup>50</sup>State of Michigan, Exec. Order No. 2005-4, available at <http://www.michigan.gov/granholm/0,1607,7-168-21975---,00.html> (signed April 22, 2005).

<sup>51</sup>State of New Jersey, Exec. Order No. 24, available at <http://www.state.nj.us/infobank/circular/eom24.htm> (signed July 24, 2002).

<sup>52</sup>State of Rhode Island, Exec. Order No. 05-14, available at [http://www.governor.ri.gov/documents/executiveorders/2005/14\\_NewBuildings\\_Energy\\_Environmental\\_Standards.pdf](http://www.governor.ri.gov/documents/executiveorders/2005/14_NewBuildings_Energy_Environmental_Standards.pdf) (signed Aug. 22, 2005).

<sup>53</sup>State of South Carolina, Energy Independence and Sustainable Construction Act, available at [http://www.scstatehouse.net/sess117\\_2007-2008/bills/3034.htm](http://www.scstatehouse.net/sess117_2007-2008/bills/3034.htm) (adopted June 20, 2007).

<sup>54</sup>State of Washington, High Performance Public Buildings, available at <http://www.ga.wa.gov/eas/green/> (signed April 8, 2005).

<sup>55</sup>State of Wisconsin, Exec. Order No. 145, available at <http://dnr.wi.gov/org/land/facilities/greenbldg/index.html> (signed April 11, 2006).

<sup>56</sup>State of Illinois, Public Act 095-0416, available at <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=095-0416> (signed Aug. 24, 2007).

<sup>57</sup>State of Pennsylvania, House Bill 628, available at <http://www2.legis.state.pa.us/WU01/LI/BI/BT/2005/0/HB0628P2564.pdf> (adopted July 2005).

<sup>58</sup>State of California, Executive Order @-20-04, available at <http://www.dot.ca.gov/hq/energy/ExecOrderS-20-04.html> (signed Dec. 14, 2004); State of California, Calgreen Code, available at [http://www.documents.dgs.ca.gov/bsc/CALGreen/2010\\_CA\\_Green\\_Bldg.pdf](http://www.documents.dgs.ca.gov/bsc/CALGreen/2010_CA_Green_Bldg.pdf) (adopted Jan. 14, 2010) (With regulations that took effect January 1, 2011, California became the first state to adopt mandatory green building standards for all new construction, including residential, commercial, hospital and school buildings. The code aims to reduce water and energy use in buildings through appliance efficiency, building design, landscaping and by using recycled materials. Local jurisdictions may adopt or maintain stricter green building standards.).

<sup>59</sup>State of Colorado, Exec. Order No. D005-05, available at <http://www.colorado.gov/dpa/doit/archives/govowens/eos/eo-05/d00505.pdf> (signed July 15, 2005); State of Colorado, Senate Bill 51, available at [© 2012 Thomson Reuters • Real Estate Law Journal • Vol. 40 Spring 2012](http://www.l</a></p></div><div data-bbox=)

updated their laws to allow LEED or another certification system. In Florida,<sup>61</sup> Hawaii,<sup>62</sup> Indiana,<sup>63</sup> Minnesota,<sup>64</sup> North Carolina,<sup>65</sup> Oklahoma,<sup>66</sup> and South Dakota,<sup>67</sup> builders must obtain green building certification by LEED or another rating system, typically the Green Globes program sponsored by the Canadian Standards Association.

Local governments with green building codes are similarly split between requiring LEED certification, or permitting certification by either LEED or another rating system.<sup>68</sup> New York City requires LEED-Silver for projects costing more than \$2 million.<sup>69</sup> Boston<sup>70</sup> and Chicago<sup>71</sup> have adapted the LEED rating system to create their own green building standards. Montgomery County, Maryland allows an equiva-

[eg.state.co.us/clics/clics2007a/csl.nsf/fsbillcont3/8EFE2CB5022F6CF687257251007C22D3?open&file=051\\_\\_enr.pdf](http://eg.state.co.us/clics/clics2007a/csl.nsf/fsbillcont3/8EFE2CB5022F6CF687257251007C22D3?open&file=051__enr.pdf) (signed April 16, 2007).

<sup>60</sup>State of Maryland, Exec. Order No. 01.01.2001.02, available at <http://www.dsd.state.md.us/comar/comarhtml/01/01.01.2001.02.htm> (signed October 2001); State of Maryland, High Performance Building Act, available at <http://mlis.state.md.us/2008rs/billfile/sb0208.htm> (signed April 24, 2008).

<sup>61</sup>State of Florida, House Bill 7135, available at [http://www.myflorida.house.gov/Sections/Documents/loaddoc.aspx?FileName=\\_\\_h7135er.xml&DocumentType=Bill&BillNumber=7135&Session=2008](http://www.myflorida.house.gov/Sections/Documents/loaddoc.aspx?FileName=__h7135er.xml&DocumentType=Bill&BillNumber=7135&Session=2008) (signed June 25, 2008).

<sup>62</sup>State of Hawaii, House Bill 2175, available at [http://www.capitol.hawaii.gov/session2006/Bills/HB2175\\_.htm](http://www.capitol.hawaii.gov/session2006/Bills/HB2175_.htm) (signed June 26, 2006).

<sup>63</sup>State of Indiana, Exec. Order No. 08.14, available at [http://www.in.gov/gov/files/EO\\_\\_08\\_\\_14.pdf](http://www.in.gov/gov/files/EO__08__14.pdf) (signed June 28, 2008).

<sup>64</sup>State of Minnesota, Next Generation Energy Act of 2007, available at <https://www.revisor.mn.gov/bin/bldbill.php?bill=S0145.2.html&session=ls85> (signed May 25, 2007).

<sup>65</sup>State of North Carolina, Senate Bill 581, available at <http://www.ncga.state.nc.us/Sessions/2007/Bills/Senate/HTML/S581v4.html> (signed Aug. 2, 2007).

<sup>66</sup>State of Oklahoma, House Bill 3394, available at [webserver1.lsb.state.ok.us/2007-08bills/HB/hb3394\\_\\_enr.rtf](http://webserver1.lsb.state.ok.us/2007-08bills/HB/hb3394__enr.rtf) (signed June 3, 2008).

<sup>67</sup>State of South Dakota, Senate Bill 188, available at <http://legis.state.sd.us/sessions/2008/Bills/SB188ENR.htm> (signed March 17, 2008).

<sup>68</sup>Del Percio and Koerner, State and Local Green Building Laws and Incentives, *supra* note 42, at 81–85; see also, Public Policy Search, United States Green Building Council, available at <http://www.usgbc.org/PublicPolicy/SearchPublicPolicies.aspx?PageID=1776> (USGBC maintains a searchable database of federal, state and local green building programs that use the LEED certification system.).

<sup>69</sup>City of New York, N.Y., Local Law 86, available at [http://www.nyc.gov/html/dob/downloads/pdf/l1\\_\\_86of2005.pdf](http://www.nyc.gov/html/dob/downloads/pdf/l1__86of2005.pdf) (signed Oct. 3, 2005).

lent rating system.<sup>72</sup> Portland, Oregon<sup>73</sup> and Boulder, Colorado<sup>74</sup> use their own rating systems. According to an inventory of 113 municipal green building programs compiled by the University of Wisconsin, 72% of municipalities require certification by LEED while the remaining 28% allow alternative means of certification.<sup>75</sup> Whether the LEED-certification system is mandated by the government, or used because it is the builder's preference, standards set by USGBC members, not government officials, are used to determine if the builder has complied with the law.<sup>76</sup>

### C. Governments Should Retain Control Over Compliance

Given the continuing growth of the green building industry, some observers speculate that governments that mandate LEED certification, rather than tailoring their own green building systems, may risk challenge under the non-delegation doctrine and, if challenged, could find that they have sacrificed accountability for the sake of efficiency.<sup>77</sup> Proponents of local green building codes note that LEED is a nationwide system that doesn't differentiate between local environmental concerns, but acknowledge that only big cit-

<sup>70</sup>City of Boston, Mass., Amendment No. 331 to Article 37 of the Boston Zoning Code, available at <http://www.bostonredevelopmentauthority.org/pdf/zoningcode/article37.pdf> (adopted Dec. 1, 2004).

<sup>71</sup>City of Chicago, Ill., Green Permit Program, [http://www.cityofchicago.org/city/en/depts/bldgs/supp\\_info/overview\\_of\\_the\\_greenpermitprogram.html](http://www.cityofchicago.org/city/en/depts/bldgs/supp_info/overview_of_the_greenpermitprogram.html) (adopted June 1, 2004).

<sup>72</sup>Montgomery County, Md., Bill 17-06, available at <http://www.montgomerycountymd.gov/content/council/pdf/bill/2006/17-06.pdf> (adopted Nov. 28, 2006).

<sup>73</sup>City of Portland, Ore., Resolution 36310, available at <http://www.portlandonline.com/shared/cfm/image.cfm?id=112682> (adopted April 27, 2005).

<sup>74</sup>City of Boulder, Colo., Ordinance 7565 established the Boulder Residential Green Points Program, available at [http://www.bouldercolorado.gov/index.php?option=com\\_content&task=view&id=208&Itemid=489](http://www.bouldercolorado.gov/index.php?option=com_content&task=view&id=208&Itemid=489) (adopted Nov. 13, 2007).

<sup>75</sup>Government Green Building Programs, Inventory University of Wisconsin, available at <http://legistar.cityofmadison.com/attachments/078dfc53-2b94-4f37-b6a7-d9b6bb984fb5.pdf>.

<sup>76</sup>LEED Committees, United States Green Building Council, available at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1750>.

<sup>77</sup>Ditta, *Leading the Way in Unconstitutional Delegations of Legislative Power: Statutory Incorporation of the LEED Rating System*, 39 Hofstra L. Rev. 369, 380–381, 399–400.

ies have in-house experts with the ability to draft building codes to regulate an evolving industry.<sup>78</sup> Others argue that incorporation of LEED is efficient and practical, but note that government officials are less susceptible to challenges under the non-delegation doctrine if they retain local control of compliance measures by requiring that projects be LEED certifiable, but not requiring actual certification.<sup>79</sup> If a local government does not have staff that can review a project to ensure compliance with applicable green building standards, the governments should consider whether mandating or incentivizing compliance are good ideas. Furthermore, local governments should consider including an appeals provision for builders who object to the mandate.<sup>80</sup>

### III. ENFORCEMENT OF GREEN STANDARDS

#### A. Compliance Measures Vary by Jurisdiction

As federal, state and local governments began to focus on energy efficiency, lawmakers imposed mandates on public agencies and offered incentives to the private sector, to offset the additional cost of green building and the risk of delays or defects stemming from the use of new green products.<sup>81</sup> For example, although New York State does not mandate compliance with LEED, the state offers tax credits to builders that obtain certification.<sup>82</sup> New Mexico offers tax credits based on the square footage of commercial and residential buildings,

<sup>78</sup>Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 Fla. L. Rev. 285, 313–315, 322–323 (Apr. 2010).

<sup>79</sup>Stephen Del Percio and Preston D. Koerner, *State and Local Green Building Laws and Initiatives*, 87 at 92 (J. Cullen Howe and Michael B. Gerrard, eds., *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing*, American Bar Association, 2010.).

<sup>80</sup>Stephen Del Percio and Preston D. Koerner, *State and Local Green Building Laws and Initiatives*, 87 at 92 (J. Cullen Howe and Michael B. Gerrard, eds., *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing*, American Bar Association, 2010.).

<sup>81</sup>Baugh, *LEED Green Building Incentives*, *supra* note 32, at 26–29; Brendan Owens, *Building Green: The Legal Risk in "Building Green"—New Wine in Old Bottles?* USGBC Panel Discussion, *Practicing Law Institute Order No. 18490*, March 20, 2009, at 49.

<sup>82</sup>State of New York, *Executive Order 111*, available at <http://www.nyserda.org/programs/pdfs/exorder111.pdf> (issued June 10, 2001); State of New York, *Green Building Tax Credit*, available at <http://www.dec.ny.gov/energy/1540.html> (adopted May 4, 2000).



with the amount of the credit based on the LEED certification level.<sup>83</sup> Nevada waives the sales tax and offers partial abatement of real property taxes for buildings that achieve LEED-Silver certification or above.<sup>84</sup> Oregon awards a tax credit to businesses that achieve LEED-Silver certification or above.<sup>85</sup> And Maryland offered a green building tax credit to builders who met the LEED-Silver standard, but all appropriations have been allocated.<sup>86</sup> Compliance requirements vary: New York requires an eligibility certificate from an architect or engineer who certifies that the building remains green; while in Nevada, deferred tax payments are payable within 90 days if the builder fails to achieve certification.<sup>87</sup> In California, where all new construction must meet green building standards, commercial buildings of more than 10,000 square feet are subject to inspection, to ensure that energy systems are working at maximum capacity.<sup>88</sup>

Initiatives at the local government level mirror the pattern found at the state level, with cities awarding a variety of tax credits and grants based on the LEED certification level, and compliance mechanisms varying by jurisdiction.<sup>89</sup>

<sup>83</sup>State of New Mexico, Sustainable Building Tax Credit, available at <http://www.nmlegis.gov/Sessions/09%20Regular/final/SB0291.pdf> (adopted April 1, 2009).

<sup>84</sup>State of Nevada, Assembly Bill 621, available at [http://www.leg.state.nv.us/74th/Bills/AB/AB621\\_\\_EN.pdf](http://www.leg.state.nv.us/74th/Bills/AB/AB621__EN.pdf) (signed June 15, 2007, amending previous green building tax abatement program adopted Aug. 16, 2006).

<sup>85</sup>State of Oregon, LEED Business Energy Tax Credit, <http://oregon.gov/ENERGY/CONS/BUS/tax/sustain.shtml> (adopted Jan. 1, 2001).

<sup>86</sup>State of Maryland, Green Building Tax Credit, available at <http://business.marylandtaxes.com/taxinfo/taxcredit/greenbldg/default.asp> (adopted Nov. 1, 2003).

<sup>87</sup>State of New York, Exec. Order No. 111, available at <http://www.nyserda.org/programs/pdfs/exorder111.pdf> (issued June 10, 2001); State of New York, Green Building Tax Credit, available at <http://www.dec.ny.gov/energy/1540.html> (adopted May 4, 2000); State of Nevada, Assembly Bill 621, available at [http://www.leg.state.nv.us/74th/Bills/AB/AB621\\_\\_EN.pdf](http://www.leg.state.nv.us/74th/Bills/AB/AB621__EN.pdf) (signed June 15, 2007, amending previous green building tax abatement program adopted Aug. 16, 2006).

<sup>88</sup>State of California, Exec. Order No. 20-04, available at <http://www.dot.ca.gov/hq/energy/ExecOrderS-20-04.html> (signed Dec. 14, 2004); State of California, Calgreen Code, available at [http://www.documents.dgs.ca.gov/vbsc/CALGreen/2010\\_\\_CA\\_\\_Green\\_\\_Bldg.pdf](http://www.documents.dgs.ca.gov/vbsc/CALGreen/2010__CA__Green__Bldg.pdf) (adopted Jan. 14, 2010).

<sup>89</sup>See, e.g.: Green Building Funding Opportunities, U.S. Environmental Protection Agency, available at <http://www.epa.gov/greenbuilding/tools/funding.htm>; State and Local Green Building Incentives, American Institute of Architects, available at <http://www.aia.org/aiaucmp/groups/ai>

In Maryland, both Baltimore<sup>90</sup> and Howard<sup>91</sup> counties offer tax credits for new construction and renovations that obtain LEED certification. Cincinnati, Ohio has a generous program, offering 100% exemption of real property taxes for commercial and residential new construction that obtains LEED certification.<sup>92</sup> Austin, Texas requires LEED certification for all public works projects over 5,000 square feet, and developers who do not meet certification requirements receive only a temporary certificate of occupancy, which may make it difficult to sell or transfer the building.<sup>93</sup> El Paso, Texas awards grants of up to \$200,000 for new construction that obtains LEED-Platinum certification, and up to \$400,000 for mixed used multistory buildings that have been 50% vacant for five years and obtain LEED-Platinum certification.<sup>94</sup> Kings County, Washington awards grants of \$15,000 to \$25,000 to builders who obtain LEED-Silver certification for new construction or major renovations, but only to projects outside the city of Seattle.<sup>95</sup> Los Angeles, California awards incentives up to \$250,000 to buildings that meet the LEED-

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[a/documents/pdf/aias076936.pdf](#); Green Building Incentive Strategies, United States Green Building Council, available at <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2078>.

<sup>90</sup>Baltimore County, Bill 85-06, available at <http://www.baltimorecountymd.gov/Agencies/economicdev/taxcredits.html> (adopted June 5, 2006; for commercial construction or renovation); Baltimore County, Bill 28-08, available at <http://resources.baltimorecountymd.gov/Documents/CountyCouncil/bills/b02808.pdf> (adopted April 22, 2008; for new residential construction).

<sup>91</sup>Howard County, Md., Bill 47-2008, available at <http://www.howardcountymd.gov/CountyCouncil/CCdocs/CB47-2008.pdf> (adopted July 30, 2007).

<sup>92</sup>City of Cincinnati, Ohio, Ordinance 446-2007, available at [http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/21605.pdf?rpp=-10&m=2&w=doc\\_\\_no%3D'200701240'](http://city-egov.cincinnati-oh.gov/Webtop/ws/council/public/child/Blob/21605.pdf?rpp=-10&m=2&w=doc__no%3D'200701240') (adopted Dec. 12, 2007).

<sup>93</sup>City of Austin, Texas, Resolution 000608-43, available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=1999> (adopted June 8, 2000).

<sup>94</sup>City of El Paso, Texas, Ordinance, available at [http://www.ci.el-paso.tx.us/muni\\_clerk/agenda/06\\_10\\_08/06100809G.pdf](http://www.ci.el-paso.tx.us/muni_clerk/agenda/06_10_08/06100809G.pdf) (adopted June 10, 2008).

<sup>95</sup>Kings County, Wash., Bill 15118, Green Building Grants Program, available at [http://www.cityofseattle.net/dpd/stellent/groups/pan/@pan/@sustainablebuilding/documents/web\\_informational/dpdp\\_018427.pdf](http://www.cityofseattle.net/dpd/stellent/groups/pan/@pan/@sustainablebuilding/documents/web_informational/dpdp_018427.pdf) (adopted Jan. 1, 2008).

Silver certification requirements.<sup>96</sup> Washington, D.C. mandates green building standards for private construction of 50,000 square feet or more, and ties a performance bond to the verification process, with the builder forfeiting the bond if LEED certification is not achieved.<sup>97</sup>

In municipalities where applicants for green projects are offered a streamlined permit review process up-front, these governments should consider whether they may impose monetary penalties should applicants later fail to comply with promised green standards. Further, governments may consider disqualifying applicants who fail to deliver promised “green” results from receiving offered incentives for a period of time. Municipalities may also explore whether authority exists to require [refundable] permit fees to cover the cost of third-party independent compliance audits to verify whether the project has met the promised or expected green standards.

#### **B. Decertification is Not Likely**

Just what would happen if a LEED-certified building were decertified is a question of first impression, as there are no judicial opinions on the subject and to date USGBC has not revoked the green label from any of the buildings it has certified.<sup>98</sup> The prospect of decertification arose when community members in Eagle River, Wisconsin challenged the LEED-Gold certification of Northland Pines High School, which was funded with \$28.5 million in bonds.<sup>99</sup> A 125-page complaint filed with USGBC alleged that the school did not qualify for LEED certification, based on a review by two independent engineers, in part because a more efficient heating and cooling system was available, but had not been

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<sup>96</sup>City of Los Angeles, Cal., LADWP Green Building Policy, available at <http://www.ladwp.com/ladwp/cms/ladwp008788.pdf> (adopted March 14, 2007).

<sup>97</sup>City of Washington, D.C., Bill B-16-515, available at <http://www.dccouncil.washington.dc.us/images/00001/20061201163509.pdf> (adopted Dec. 5, 2006).

<sup>98</sup>Christopher W. Cheatham, LEED Certification Challenges and the Northland Pines High School Incident, Green Building Law Update, available at <http://www.greenbuildinglawupdate.com/uploads/file/Northland%20Pines%20PDF.pdf>.

<sup>99</sup>Christopher W. Cheatham, LEED Certification Challenges and the Northland Pines High School Incident, Green Building Law Update, available at <http://www.greenbuildinglawupdate.com/uploads/file/Northland%20Pines%20PDF.pdf>.

used.<sup>100</sup> According to a GBCI policy manual, the institute that certifies buildings for the USGBC may revoke LEED certification if it determines that credits and prerequisites for certification were granted based on erroneous, inaccurate or falsely submitted documentation.<sup>101</sup> After consulting with two additional engineers, USGBC concluded that the school did not meet prerequisites for certification, but nevertheless had sufficient evidence to award the credits needed to grant LEED certification.<sup>102</sup> Disappointed community members complained that the USGBC thought “pretty close” was enough.<sup>103</sup>

The question of decertification came up again when USGBC adopted the LEED 2009 rating system, which requires data showing energy and water usage for five years, to track the performance of all certified buildings.<sup>104</sup> A policy manual states that certification can be revoked if a project fails to provide data, but notes that data is disclosed on a confidential basis.<sup>105</sup> USGBC intends to use the data to drive higher building performance by improving future versions of the certification system, but will not revoke certification

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<sup>100</sup>Christopher W. Cheatham, LEED Certification Challenges and the Northland Pines High School Incident, Green Building Law Update, available at <http://www.greenbuildinglawupdate.com/uploads/file/Northland%20Pines%20PDF.pdf>.

<sup>101</sup>LEED Certification Policy Manual, United States Green Building Council, available at <https://www.leedonline.com/irj/go/km/docs/document/usgbc/leed/config/terms/LeedCertificationManual/LEEDCertificationPolicyManual.pdf>.

<sup>102</sup>Press Release, Northland Pines Retains Status as First LEED-Gold Public High School in the US, Northland Pines School District, available at <http://www.npsd.k12.wi.us/district/NPHS%20Press%20Release%20-%20LEED.pdf>.

<sup>103</sup>Sulkowski, LEEDigation: the Risks, Why We Don't See More, and Practical Guidance Related to Green Building Contracts, 39 Real Est. L. J. 192, 200–201 (2010).

<sup>104</sup>Buildings Seeking LEED to Provide Performance Data: Energy and Water usage becomes a precondition of certification, United States Green Building Council, available at <http://www.usgbc.org/Docs/News/MPRs%200609.pdf>.

<sup>105</sup>LEED 2009 for New Construction and Major Renovations, United States Green Building Council, available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=5546>.

based on a building's performance.<sup>106</sup> LEED 2009 is the fifth version of the certification system since USGBC formed in 1993; projects must comply with the version of the rating system that was in effect at the time they registered for the program.<sup>107</sup> As a result, some LEED-certified buildings would not be able to obtain the green label if they were rated today.<sup>108</sup> For example, the Federal Building in Youngstown Ohio, which is LEED certified, could not obtain an Energy Star label after the U.S. Environmental Protection Agency reviewed a year of utility bills.<sup>109</sup>

#### **IV. CONCLUSION — THE LAW MUST PLAY CATCH-UP TO ENSURE ACCOUNTABILITY FOR ENVIRONMENTAL POLICY AND PUBLIC MONEY**

In an era of high unemployment, dwindling tax revenues and huge budget deficits, governments may be more likely to promote green building through mandates, and the public will desire accountability for incentives funded with public money or through the abatement of taxes and fees.<sup>110</sup> However, with the exception of a handful of initiatives, like the verification requirements for tax incentives in Nevada, the performance bond required for mandatory green building in Washington, D.C., and mandatory energy efficiency inspections in California, few legislative bodies include compliance measures when they incorporate LEED into their building codes.<sup>111</sup> As the industry grows, compliance measures aimed at tracking building performance after certifica-

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<sup>106</sup>LEED 2009 for New Construction and Major Renovations, United States Green Building Council, available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=5546> at xiii.

<sup>107</sup>LEED 2009 for New Construction and Major Renovations, United States Green Building Council, available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=5546>. at xi.

<sup>108</sup>Mireya Navarro, Some Buildings Not Living Up to Green Label, *The New York Times*, Aug. 31, 2009, available at <http://www.nytimes.com/2009/08/31/science/earth/31leed.html>.

<sup>109</sup>Mireya Navarro, Some Buildings Not Living Up to Green Label, *The New York Times*, Aug. 31, 2009, available at <http://www.nytimes.com/2009/08/31/science/earth/31leed.html>.

<sup>110</sup>Stephen Del Percio, Why You Won't Find "LEEDigation" Under Your Green Building Christmas Tree, *Green Real Estate Law Journal*, available at <http://www.greenrealestatelaw.com/2010/12/why-you-wont-find-leedigation-under-your-green-building-christmas-tree/>.

<sup>111</sup>See, Delaney, Abrams, and Schnidman, Handling the Land Use Case, § 42:5 at FN16, FN 17; Les Lo Baugh, LEED Green Building Incentives, *Practicing Law Institute Order No. 16007*, March 2008 at 29–32.

tion has been achieved may take on greater importance.<sup>112</sup> And some green promises may prove to be illusory.<sup>113</sup>

The case of Destiny USA—a megamall project in Syracuse, New York, which is partly financed by \$228 million in green bonds backed by the federal government—illustrates the point.<sup>114</sup> The green bonds amount to a tax-free loan from the government, but they are predicated on the developer's promise to incorporate environmentally-friendly features into the retail and entertainment venture that promised to include 1,000 shops and restaurants, 80,000 hotel rooms, a 40,000-seat arena, a water park, an aquarium and a technology park.<sup>115</sup> Construction began in 2007, soon after the Syracuse Industrial Development Agency sold the bonds, and was 90% complete by 2009, when Citibank stopped funding a \$155 million construction loan due to concerns about delays, cost over-runs and a lack of signed leases.<sup>116</sup> The dispute settled after an appellate court upheld a preliminary injunction requiring Citibank to fund the loan, holding that green bonds are so unique that damages alone would not be sufficient should Destiny USA prevail in court.<sup>117</sup> Construction resumed in spring 2011.<sup>118</sup> However, in a compliance letter to the Internal Revenue Service ("IRS"), Destiny USA

<sup>112</sup>Vyas and Gentilcore, *Growing Demand for Green Construction Requires Legal Evolution*, 30 SUM Const. L. 10 (Summer 2010).

<sup>113</sup>See, e.g. Christopher W. Cheatham, *IRS to Audit Destiny USA's Green Bonds*, Green Building Law Update, available at <http://www.greenbuildinglawupdate.com/tags/destiny-usa/>.

<sup>114</sup>Rich Moriarty, *Faded Green Promises Could Cost Destiny Millions: Destiny Hasn't Delivered on Technology Touted as an Example to America; Tax Breaks at Risk*, The Syracuse Post-Standard, Feb. 20, 2011, A1 (A provision inserted into American Jobs Creation Act of 2004, by then-Sen. Hillary Clinton and Sen. Charles Schumer, both of New York, included \$2 billion in AAA-rated bonds from the U.S. Treasury for four huge mall projects.).

<sup>115</sup>Jenna McKnight, *Ground breaking could signal brighter future for Destiny USA*, Architectural Record, Oct. 1, 2007, available at 2007 WLNR 20242666.

<sup>116</sup>Rich Moriarty, *Faded Green Promises Could Cost Destiny Millions: Destiny Hasn't Delivered on Technology Touted as an Example to America; Tax Breaks at Risk*, The Syracuse Post-Standard, Feb. 20, 2011, A1.

<sup>117</sup>*Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 69 A.D.3d 212, 889 N.Y.S.2d 793 (4th Dep't 2009), leave to appeal dismissed, 85 A.D.3d 1656, 924 N.Y.S.2d 874 (4th Dep't 2011).

<sup>118</sup>Rich Moriarty, *Faded Green Promises Could Cost Destiny Millions: Destiny Hasn't Delivered on Technology Touted as an Example to America; Tax Breaks at Risk*, The Syracuse Post-Standard, Feb. 20, 2011, A1.

acknowledged that many of the promised green technologies are no longer part of the project.<sup>119</sup> There will be no 45-megawatt electricity-generating plant run on biofuel, no fuel cells to create 7 megawatts of electricity, and 290,000 square feet of solar panels would not be installed on the roof.<sup>120</sup> Destiny USA blamed the economic downturn and argued that it should be able to keep its tax-exempt status, which is worth \$120 million over the 30-year life of the bonds, and not forfeit \$2.3 million held in reserve should the project not result in a green venue.<sup>121</sup> In response, the IRS announced its intention to audit the project, which is pending.<sup>122</sup>

Given the widespread support for green building, governments and industry officials who support green building should consider stronger compliance measures to guard against the kinds of broken promises that could give green building a black eye, particularly when public money is used to spur private investment.<sup>123</sup> LEED began as a voluntary system, yet it has not been challenged by builders, even as lawmakers across the nation have made compliance mandatory, perhaps because the public relations benefits of obtaining a green label outweigh the bad press litigation could generate, or because LEED standards are not that difficult

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<sup>119</sup>Rick Moriarty, *IRS Audits Destiny's Green Bonds: Destiny Promised to use Green Technology in the Project*, *The Syracuse Post Standard*, April 18, 2011, A3.

<sup>120</sup>Rick Moriarty, *IRS Audits Destiny's Green Bonds: Destiny Promised to use Green Technology in the Project*, *The Syracuse Post Standard*, April 18, 2011, A3.

<sup>121</sup>Rick Moriarty, *IRS Audits Destiny's Green Bonds: Destiny Promised to use Green Technology in the Project*, *The Syracuse Post Standard*, April 18, 2011, A3.

<sup>122</sup>Rick Moriarty, *IRS Audits Destiny's Green Bonds: Destiny Promised to use Green Technology in the Project*, *The Syracuse Post Standard*, April 18, 2011, A3.

<sup>123</sup>Rich Moriarty, *Faded Green Promises Could Cost Destiny Millions: Destiny Hasn't Delivered on Technology Touted as an Example to America; Tax Breaks at Risk*, *The Syracuse Post-Standard*, Feb. 20, 2011, A1. (Article quotes Ashok Gupta, senior energy economist at the New York City-based Natural Resources Defense Council, who told a reporter that he was not surprised to see Destiny USA, which had no prior experience with green building, fail to deliver on its environmental promises. "It's good to have a showcase, but to overpromise and under deliver gives the industry a black eye," Gupta said.)

to meet.<sup>124</sup> Further, complaints about green building standards revolve around implementation and incentive programs, not the underlying science related to global climate change, suggesting that concern over the harmful effects of greenhouse gases is widespread.<sup>125</sup> However, the LEED system is evolving within a market-driven industry, and highly technical building standards make it difficult for policy makers and the public to evaluate the performance of a green building or determine if green building policies are reducing negative environmental impacts.<sup>126</sup> Hard data required by LEED 2009 can be used to police exaggerated claims and refine green building standards, so governments should remain vigilant to ensure that green building mandates help communities achieve environmental goals, and that public money used to offer incentives is wisely spent.<sup>127</sup> In the meantime, the wide variety of approaches to green building taken by state and local governments suggests that the law will have to play catch-up to address the unique risks of green building.<sup>128</sup>

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<sup>124</sup>Fox, A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards, 28 Va. Env'tl. L.J. 299 at 326–327 (2010); Schindler, Following Industry's LEED: Municipal Adoption of Private Green Building Standards, 62 Fla. L. Rev. 285 at 328 (Apr. 2010).

<sup>125</sup>Fox, A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards, 28 Va. Env'tl. L.J. 299, 326 (2010).

<sup>126</sup>Stephen Del Percio and Preston D. Koerner, State and Local Green Building Laws and Initiatives, 87 (J. Cullen Howe and Michael B. Gerrard, eds., *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing*, American Bar Association, 2010.) at 71.

<sup>127</sup>Stephen Del Percio and Preston D. Koerner, State and Local Green Building Laws and Initiatives, 87 (J. Cullen Howe and Michael B. Gerrard, eds., *The Law of Green Buildings: Regulatory and Legal Issues in Design, Construction, Operations, and Financing*, American Bar Association, 2010.) at 71; see also Fox, A Climate of Change: Shifting Environmental Concerns and Property Law Norms Through the Lens of LEED Building Standards, 28 Va. Env'tl. L.J. 299, 340 (2010).

<sup>128</sup>Vyas and Gentilcore, Growing Demand for Green Construction Requires Legal Evolution, 30 SUM Const. L. 10, 21 (Summer 2010).