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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. 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. Nationwide, about 40% of carbon dioxide emissions came from buildings, significantly more than the 27% generated by the transportation sector. In response, green buildings seek to use land and energy ef-

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1 Salkin, Cooperative Federalism and Climate Change: New Meaning to “Think Globally-Act Locally,” 40 Env'tl. 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.”).


ficiently, conserve water, improve indoor air quality, use recycled and renewable materials in the construction process and recycle construction debris.\textsuperscript{4}

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.\textsuperscript{5} 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.\textsuperscript{6} 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.\textsuperscript{7} 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, 1

\textsuperscript{4}Howe, Overview of Green Buildings, 41 Env't. L. Rep. News & Analysis 10043.
\textsuperscript{6}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.).
which consumes 50% less energy than a traditional office building, and generates its energy with solar panels.8

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.9 With the green building industry still in its infancy, reliable data is hard to come by.10 The United States Green Building Council (“USGBC”)—which created the most widely used green building rating system in the nation11—claims that building green costs 2.5% more upfront, but offsets the additional cost in five to eight years through energy savings.12 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 Environment-
tal Design ("LEED") certification system. 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. 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. 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.

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. 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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waivers to height and density limitations.\textsuperscript{18} 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.\textsuperscript{19} Due to widespread government backing, some builders describe the industry as “recession proof.”\textsuperscript{20}

LEED has four certification levels—certified, silver, gold and platinum—which are achieved by earning points based on a variety of environmental factors.\textsuperscript{21} 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

\textsuperscript{18}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.).


\textsuperscript{21}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. So far, more than 7,885 green buildings have been LEED certified, and another 23,232 are in the process of certification. Although industry observers have predicted that green building standards will prompt “LEEDigation,” there are few reported cases, with the litigation to date revolving around the failure to sufficiently define risk and liability in a green building contract, and whether standards in local energy conservation codes can be stricter than those set by the federal government. Construction attorneys predict that green building litigation will grow, with contract disputes revolving around a failure to achieve green building certification and defects that limit energy performance after

25 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.).
construction is complete. 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. 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. Given the widespread

28 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) (Expect 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.).


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, and 2) Whether the government is able to require compliance or prepared to rescind incentives if buildings do not meet green standards.

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. 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. 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 public.


33 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.”).

electorate. 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.

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”). 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.

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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35 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.”).


Yet another study concluded that LEED certification standards are insufficient because the certification system awards too few points to systems that improve air...
quality, an area of increasing concern.\textsuperscript{43} 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.\textsuperscript{44} Notably, the challenge to LEED standards was launched in the private sector, and was not the result of government supervision or public input.\textsuperscript{45}

\textbf{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.\textsuperscript{46} 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,\textsuperscript{47} Connecticut,\textsuperscript{48} Maine,\textsuperscript{49} Michigan,\textsuperscript{50} and California.\textsuperscript{51}


\textsuperscript{45}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.).

\textsuperscript{46}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.).


gan, New Jersey, Rhode Island, South Carolina, Washington and Wisconsin 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. Similarly, Colorado and Maryland initially required LEED certification for buildings constructed with state funding, but later

updated their laws to allow LEED or another certification system. In Florida, Hawaii, Indiana, Minnesota, North Carolina, Oklahoma, and South Dakota, 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. New York City requires LEED-Silver for projects costing more than $2 million. Boston and Chicago have adapted the LEED rating system to create their own green building standards. Montgomery County, Maryland allows an equiva-
lent rating system. 72 Portland, Oregon 73 and Boulder, Colorado 74 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. 75 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. 76

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. 77 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-

ies have in-house experts with the ability to draft building codes to regulate an evolving industry. 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. 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.

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. For example, although New York State does not mandate compliance with LEED, the state offers tax credits to builders that obtain certification. New Mexico offers tax credits based on the square footage of commercial and residential buildings,


with the amount of the credit based on the LEED certification level. 83 Nevada waives the sales tax and offers partial abatement of real property taxes for buildings that achieve LEED-Silver certification or above. 84 Oregon awards a tax credit to businesses that achieve LEED-Silver certification or above. 85 And Maryland offered a green building tax credit to builders who met the LEED-Silver standard, but all appropriations have been allocated. 86 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. 87 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. 88

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. 89

In Maryland, both Baltimore\(^90\) and Howard\(^91\) 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.\(^92\) 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.\(^93\) 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 multiistory buildings that have been 50% vacant for five years and obtain LEED-Platinum certification.\(^94\) 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.\(^95\) Los Angeles, California awards incentives up to $250,000 to buildings that meet the LEED-


Silver certification requirements. 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.

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. 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. 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

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. 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. Disappointed community members complained that the USGBC thought “pretty close” was enough.

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. 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. 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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based on a building’s performance. 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. As a result, some LEED-certified buildings would not be able to obtain the green label if they were rated today. 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.

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. 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. As the industry grows, compliance measures aimed at tracking building performance after certifica-
tion has been achieved may take on greater importance.\textsuperscript{112} And some green promises may prove to be illusory.\textsuperscript{113}

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.\textsuperscript{114} 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.\textsuperscript{115} 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.\textsuperscript{116} 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.\textsuperscript{117} Construction resumed in spring 2011.\textsuperscript{118} However, in a compliance letter to the Internal Revenue Service (“IRS”), Destiny USA

\textsuperscript{112}Vyas and Gentilcore, Growing Demand for Green Construction Requires Legal Evolution, 30 SUM Const. L. 10 (Summer 2010).


\textsuperscript{118}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. 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. 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. In response, the IRS announced its intention to audit the project, which is pending.

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. 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.

123 Rick 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.).
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. 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. 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. 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.


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