



Smart Growth and Green Buildings Committee Newsletter

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January 2012

THE BUSINESS OF GOING GREEN

Jacob Cremer and Sarah Payne-Jarboe

As your newsletter editors, we are excited about this year's first issue. Through the topic of "The Business of Going Green," this volume delves into the motivations of many different players in the Smart Growth and Green Building industry. We begin with an article that analyzes *Gifford v. U.S. Green Building Council* and how one federal court dispensed with Lanham Act claims against the LEED certification program. In a twist on the theme, the second article provides an example of how green building codes are themselves a business. The third article illustrates lessons from a nonprofit organization's sustainable building project in an underdeveloped urban area. This is followed by one attorney's personal experience renovating his home to meet LEED certification standards and the difficulties his family faced in the process. Finally, an article on green leases asks whether they are not simply business as usual.

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LEED AND THE BUILDING PROFESSIONAL: NO COMPETITION

Reda Hicks

Introduction

Recently, the U.S. District Court for the Southern District of New York issued a first-of-its-kind decision that precluded building professionals from challenging the U.S. Green Building Council's (USGBC) LEED certification program under the Lanham Act. The lawsuit, brought by one of the more vocal opponents of the LEED rating system, sought to recover for alleged false and misleading statements by the USGBC concerning LEED, which resulted in damage to non-LEED building professionals.

The Southern District of New York held that there must be a clear competitive nexus between the plaintiffs and the USGBC in order for claims to be brought under the Lanham Act. More importantly, green building professionals actually involved in the design and construction process do not qualify as competitors under the Lanham Act because, according to the court, there is no direct competition between these professionals and the USGBC, which only analyzes and rates systems developed by others.

Background—the USGBC and LEED

The USGBC was founded in 1993 by a group of building professionals to promote sustainability in the

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way buildings are designed, built, and operated. U.S. Green Building Council, About USGBC, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=124> (last visited Oct. 23, 2011). A nonprofit organization, the USGBC developed its first set of “green building” guidelines, the Leadership in Energy and Environmental Design (LEED) rating system, as a pilot program in 1998. A number of updates have been made to the LEED system, including LEED 2.0 in 2000, which expanded new construction guidelines, and LEED 2009, which added guidelines for major renovations.

In 2007, the USGBC created the Green Building Certification Institute (GBCI), an affiliate responsible for awarding LEED certification to building projects based on an accumulation of building and design-related points. GBCI is also responsible for overseeing the accreditation program by which individual professionals can become LEED certified. For individuals, LEED certification is obtained by passing one of several qualifying examinations specific to particular areas of expertise in green building. For building projects, LEED certification is a point-based system, with points awarded in a wide variety of categories—such as energy and water use, types of building materials, types of ventilation systems, and so on—aimed at improving the environmental efficiency of the building project seeking qualification.

Gifford’s Criticism of the USGBC and LEED

Over the years the USGBC, and LEED in particular, have certainly had their critics. No two building professionals agree precisely on how sustainable design and construction should be analyzed. The fact that the USGBC is regularly working on updates to the system is itself an indication that LEED is not perfect. However, there are some in the building community who believe that LEED is broken beyond repair. Perhaps LEED’s most vocal critic in the latter category has been the well-intentioned, if hot-headed, Henry Gifford. Gifford describes himself as a consultant with many years of experience advising clients about how to reduce their energy costs. Gifford was one of the first U.S. graduates of the PassivHaus program, but he

places much more emphasis on his twenty-plus years of experience than on any formal education. James Westwater, *Henry Gifford on LEED Buildings*, An Artist in Beacon, Jan. 27, 2009, <http://beaconartist.blogspot.com/2009/01/henry-gifford-on-leed-buildings.html> (last visited Nov. 7, 2011). Also, and oddly, he is known by most New Yorkers as the “Boiler Man” because of his extreme affection for the vintage heating devices. Robert Sullivan, *In the Basement: The Boiler Man*, NEW YORKER, Mar. 17, 2003, available at http://www.newyorker.com/archive/2003/03/17/030317ta_talk_sullivan (last visited Nov. 7, 2011). If that does not make clear that Gifford is a horse of a different color, nothing will.

Gifford has intentionally not pursued LEED certification. He has been adamant in his disagreement with LEED certification as a qualification of building professionals. Gifford’s primary criticisms concerning LEED—that it does not actually measure a building’s energy performance—are perhaps summed up best in the opening paragraph of the first complaint he filed with the court:

USGBC’s L.E.E.D. rating system is supplanting building codes in many jurisdictions, undermining market place competition and obscuring other building standards that *are* proven—unlike L.E.E.D.—to reduce energy use and carbon emission (such as the U.S.D.O.E.’s Energy Star program, ASHRAE standards, PassivHaus/Passive House USA standards, Air Barrier Association of America standards, etc.) . . . When L.E.E.D.- accredited professionals design and build buildings instead of skilled professionals, such as Plaintiffs . . . the marketplace, consumers, and the environment, often suffer.

Complaint at 1–2, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (1). Essentially, Gifford’s position is that neither LEED building certification nor LEED professional certification is an accurate gauge of building performance or professional acumen. Moreover, Gifford argues, by investing so much into marketing efforts that put LEED at the forefront of general

dialogue concerning green building standards, the USGBC skews focus from systems that actually do improve building performance.

Gifford's long-time efforts to rail against the system are, by all accounts, a well-intentioned if misguided effort to "save the green building industry from itself," challenging the status quo now to avoid embarrassment later. *See* Westwater, <http://beaconartist.blogspot.com/2009/01/henry-gifford-on-leed-buildings.html> (last visited Nov. 7, 2011). Says Gifford, "My biggest fear is that a few years from now LEED will have convinced people that large numbers of buildings are as efficient as they can be, and therefore the only choices are to give up our creature comforts or have more wars [over oil]." *Id.* This kind of rhetoric about the potential ability to use LEED for "evil" purposes (war included) seems to permeate Gifford's discussions about the ratings system, and his motives for suing the USGBC. Tristan Roberts, *USGBC, LEED Targeted by Class-Action Suit*, ENVTL. BUILDING NEWS, Oct. 14, 2010, available at <http://www.buildinggreen.com/auth/article.cfm/2010/10/14/USGBC-LEED-Targeted-by-Class-Action-Suit/> (last visited Nov. 7, 2011).

Gifford v. U.S. Green Building Council

Gifford filed his first complaint on October 8, 2010. *See* Complaint, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (1) (the "original complaint"). The original lawsuit was a class action, purportedly on behalf of all green building professionals and the public. The original complaint contained sweeping allegations that the USGBC is a monopoly, included numerous federal and state allegations related to false advertising and unfair trade practices, and asserted wire fraud and violations of the federal Racketeer Influenced and Corrupt Organizations (RICO) statute.

Before the USGBC even responded fully to the original complaint, however, Gifford filed an amended complaint. Amended Complaint, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (17) (the "amended complaint"). The amended complaint removed the class allegations—likely due to the response in the

community that Gifford does not represent the majority sentiment—and the most controversial causes of action, including the causes of action for antitrust violations, wire fraud, and RICO.

The amended complaint added three building professionals, Matthew Arnold, a licensed architect, Andrew Ask, an engineer specializing in heating and cooling systems, and Elisa Larkin, a moisture and mold remediation specialist, as plaintiffs to the lawsuit. For all intents and purposes, however, both complaints were, at bottom, Gifford's. The new plaintiffs, although they may have their own qualms with LEED, seemed to simply be along for the ride.

The common thread in both complaints consisted of statements made by the USGBC that plaintiffs alleged to be false. The two most frequently cited statements in the complaints were: (1) a Web site excerpt stating that LEED "provides a third-party verification that a building . . . was designed and built using strategies aimed at improving performance . . . most of all energy savings;" and (2) a press release excerpt stating that, on average, LEED buildings save 25–30 percent more energy than non-LEED buildings.

On April 6, 2011, the USGBC moved to dismiss the amended complaint in its entirety on three grounds: (1) plaintiffs failed to satisfy the requirement to plead with specificity; (2) plaintiffs lack statutory standing under the Lanham Act; and (3) plaintiffs lack Article III standing because they failed to allege any direct injury. *See* Memorandum in Support of Motion by Defendant, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (20) (the motion). Briefing on the motion was completed on May 6, 2011; plaintiffs filed a response on May 2, 2011, *see* Reply of Plaintiff, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (23) (the "response"), and the USGBC filed a reply on May 6, 2011, *see* Reply of Defendant, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (24) (the "reply"). On August 15, 2011, the court issued its order. *See* Order on Motion to Dismiss, *Gifford v. U.S. Green Building Council*, 2011 U.S. Dist. LEXIS 92625 (S.D.N.Y. 2011) (25) (the "order").

For the reasons discussed below, the court found that plaintiffs lacked both statutory and Article III standing, and dismissed the plaintiffs' claims: the federal claims with prejudice, and the state law claims without prejudice to refile in the New York state court. Based on these rulings, the court did not analyze the plaintiffs' New York state law claims in any great detail.

The plaintiffs' broad manner of pleading in the amended complaint and the response provided the court with latitude to comment on LEED as a system. And many, such as Gifford, would certainly have preferred to see this kind of commentary from the court, if only in the hope that it might spur action by the USGBC to remedy perceived issues with the LEED system. However, the court took a more narrow approach to the question before it—since the plaintiffs lacked standing, the court did not reach the remaining elements of the Lanham Act, including the question of whether the USGBC's statements were false.

Lanham Act Standing

The circuit courts are split on the question of how to analyze standing under the Lanham Act. Some circuits follow the "reasonable commercial interest" test, while others follow the "strong categorical" test. Courts in the Second Circuit have applied both tests, and so the *Gifford* court analyzed both in its order. The court held that under either test, the *Gifford* plaintiffs fell far short of establishing standing under the Lanham Act.

Strong Categorical Test

The strong categorical test requires that the plaintiff be a competitor of the defendant able to allege actual competitive injury. *Famous Horse, Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 112 (2d Cir. 2010). In other words, the two parties are direct competitors, and one can trace injury to the actions of the other. In *Gifford*, the plaintiffs argued that this test was satisfied because they compete against the USGBC in the "market for energy efficient building expertise." However, the court held that despite this broad characterization, there was no correlation between the "products" offered by the USGBC versus the plaintiffs. See Order, at 5. Plaintiffs provide "advice about how to design and construct energy efficient buildings,"

whereas the USGBC provides no such advice, but instead "reviews and rates designs created by others." *Id.*

Based on the court's reasoning, to satisfy the strong categorical test for purposes of Lanham Act standing, the party asserting a claim would have to be another entity whose "product" consisted of reviewing and rating energy efficient designs. This ruling is likely to preclude the majority of green building professionals from asserting Lanham Act claims in "strong categorical" circuits, but it could open the door to recovery for organizations such as Green Globes or PassivHaus, which have "products" comparable to LEED.

"Reasonable Commercial Interest"

The reasonable commercial interest test requires that a plaintiff show (1) a reasonable interest to be protected against the false advertising alleged, and (2) a reasonable basis for believing that his interest is likely to be damaged by the alleged false statements. *Famous Horse*, 624 F.3d 106, 112–13; *Telecom Int'l Am., Ltd. v. AT&T Corp.*, 280 F.3d 175, 197 (2d Cir. 2001). Unlike the strong categorical test, the reasonable commercial interest test does not require that the parties be direct competitors. However, the existence of such competition is a "strong indication of why the plaintiff has a reasonable basis for believing that its interest will be damaged." See Order, at 4. Accordingly, where a plaintiff cannot show that the allegedly false advertisements "do not draw direct comparisons between the products, a plaintiff must make a more substantial showing of injury and causation" to satisfy the test. *Id.* at 5, quoting *Ortho Pharma. Corp. v. Cosprophar, Inc.*, 32 F.3d 690, 694 (2d Cir. 1994) (quotations omitted).

The court held that the *Gifford* plaintiffs could make no such showing. First, the court noted the speculative nature of the general assertion that "LEED has begun to subsume the Plaintiffs' roles" in the marketplace because LEED does not offer the same services as the plaintiffs. Order, at 6. And even if LEED-accredited professionals are a source of competition for the plaintiffs, "it is not plausible that each customer who

opts for LEED certification is a customer lost to Plaintiffs” because (1) LEED building projects still require the kinds of services plaintiffs provide and (2) LEED does not require that the professionals hired to work on a LEED project be LEED-accredited professionals. *Id.*

To obtain standing under the Lanham Act, a party must show that their “sales are specifically affected by [d]efendant’s behavior.” *Id.* at 7 (quotations omitted). The court held that even if it were true that the USGBC’s statements were false, the suggestion that they have any bearing on plaintiffs’ business is simply too speculative to support a claim under the Lanham Act. *Id.*

As with the strong categorical test, it is unlikely that green building professionals will be able to establish standing to assert Lanham Act claims against the USGBC in reasonable commercial interest jurisdictions, although other ratings systems potentially can. However, if the statements were made by a LEED-accredited professional rather than the USGBC, there is a higher likelihood of establishing direct effects of the statements on the business of non-LEED professionals offering the same services. Perhaps the lesson to take away for LEED-accredited professionals is to take care in the USGBC statements that they adopt in their own marketing materials. Gifford is not alone in his criticism of the USGBC statistics and studies, and any LEED-accredited professional who repeats them in his own materials should be aware of the potential liability associated with that practice. Joseph Eckhardt, *LEED Avoids Class Action, Energy Savings Claims Left Untested*, AHEAD OF SCHEDULE, Aug. 23, 2011, <http://www.aheadofschedulelaw.com/2011/08/articles/green-building-1/leed-avoids-class-action-energy-savings-claim-left-untested/> (last visited Nov. 7, 2011); Richard Defendorf, “USGBC v. Energy Efficiency” *Finds Its Way to Litigation*, GREEN BUILDING ADVISOR, Oct. 16, 2010, <http://www.greenbuildingadvisor.com/blogs/dept/green-building-news/usgbc-v-energy-efficiency-finds-its-way-litigation> (last visited Nov. 7, 2011).

Going Forward After Gifford


Given his long-standing criticism of LEED, it is unlikely we have heard the last of Henry Gifford. The court’s ruling left open the possibility of refiling his state law claims in New York, and certainly there is always the possibility of appeal. On the issue of standing, however, the court’s reasoning is sound, and it is unlikely that Gifford will fare much better in his state claims, which also hinge on competition and direct injury that he simply cannot show. And of course, even should Gifford overcome these procedural obstacles, proving intent on the part of the USGBC is a sizable hurdle even Gifford has admitted he might not overcome—even he is not completely convinced that anyone at the USGBC intended to publish false statements. *See Roberts*, <http://www.buildinggreen.com/auth/article.cfm/2010/10/14/USGBC-LEED-Targeted-by-Class-Action-Suit/> (last visited Nov. 7, 2011)

Probably the most disappointing aspect of his case for Gifford, however, is that it seems like the question of whether the statements made by the USGBC were false is not one that will be answered any time soon. So convinced is Gifford that the USGBC’s studies are flawed that he actually published his own counter studies on building efficiency in response. For Gifford, and others in the green building industry like him, the lawsuit is about vindication and principles more than anything else.

Although certainly not the sole reason, the *Gifford* suit was likely a catalyst of the USGBC’s new efforts to improve reporting and information-sharing requirements among building professionals and existing LEED projects. Alec Appelbaum, *LEED 2012: The USGBC Adds Teeth, Real-time Reporting to Its Green Building Ratings*, Aug. 31, 2011, <http://www.fastcompany.com/1777188/leed2012-the-usgbc-brings-real-time-reporting-and-recertification-to-its-green-building-ratings> (last visited Nov. 7, 2011). For many in the profession, the improved transparency that seems to be slowly making its way into the LEED process is precisely what they were hoping would come of the legal challenge.

For Gifford, however, the battle will not be won until LEED is defunct and replaced by his preferred systems, such as PassivHaus, Energy Star, or Green Globes. But the marketplace, rather than the courts, seems like a better place to test the question of which is the superior ratings system than the court. In the meantime, the question for all green building professionals becomes: Why not get LEED-accredited? Even if you place no faith in LEED, it seems like a better way to assuage the concern over the possibility of lost business than a lawsuit, especially given the *Gifford* court's ruling on standing.

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Trends: Section newsletter now in new electronic format

Trends can be found in a new electronic format at www.ambar.org/EnvironTrends. Beginning with the November/December 2011 issue, individual articles will be posted in html format and will contain hyperlinks to important cases and other resources cited in the articles.

When a new issue becomes available online, Section members will be sent an e-mail announcement. Open that announcement and the latest issue of *Trends* will be available on your desktop, laptop, tablet, or smart phone.

Trends will be made available to Section members exclusively in electronic format. There are plans for continued optimization of the *Trends* electronic format to better serve Section members. The Section is also developing enhanced electronic formats for *Natural Resources & Environment* and *The Year in Review*.

CALIFORNIA RAINWATER CAPTURE: BATTLE OF THE BUILDING CODES

Alf W. Brandt

This year, the California legislature tried to authorize a key sustainable practice for water supply—rainwater capture—in Assembly Bill 275. A battle over building codes, however, got in the way. Governor Jerry Brown's veto message was simple: "This measure seeks to adopt an interim standard for rainwater capture outside the established Building Standards Commission process. Without some urgency or a more compelling reason, I think it is better to stick with the process and follow existing law." This veto followed unanimous legislative votes for rainwater capture by the legislature.

How did AB 275 go from unanimous support to gubernatorial veto? The answer lies in long-standing competition between organizations that develop and publish building codes, in this case, the plumbing code. One provision of AB 275 allowed nonpotable use of rainwater indoors, which is the province of the plumbing code. Relying on existing California law, the bill adopted the 2010 Green Plumbing and Mechanical Code Supplement on rainwater plumbing produced by the International Association of Plumbing and Mechanical Officials (IAPMO), until the California Building Standard Commission could adopt standards for rainwater capture in 2013. This IAPMO reference led its competitor, the International Code Council (ICC), to oppose the bill, which eventually led to the veto. Competition between green building code organizations prevailed.

I. "Green" Building Code Organizations

In the race to go green, building code publishers have adopted codes to promote green building construction. Some organizations have developed codes for more than a century, while others started little more than a decade ago. Some codes set minimum standards, while others set higher standards as a baseline for defining sustainable "green" construction. Code publishers all claim nonprofit status. But that status does not stop competition among these code-

publishing businesses. Currently, four organizations have developed sets of building standards or “codes” for rainwater capture:

- **IAPMO:** Formed in 1926 by a group of Los Angeles plumbing inspectors, with the goal of creating a standardized plumbing code to protect public health and safety, IAPMO published its first model plumbing code in 1929. Today, IAPMO publishes the Uniform Mechanical Code, the Uniform Solar Energy Code, and the Uniform Swimming Pool, Spa and Hot Tub Code. In 2010, IAPMO adopted a Green Plumbing and Mechanical Code Supplement, a document intended to allow early adoption of green plumbing and mechanical standards that had not yet been incorporated into the Uniform Plumbing Code and Uniform Mechanical Code. IAPMO is expected to adopt much of this supplement, including rainwater catchment system provisions, into the uniform plumbing and mechanical codes in 2012.
- **ICC:** In 1994, several associations of building safety officials combined to create the ICC, which publishes an integrated family of building codes, including the International Building Code, Fire Code, Mechanical Code, and Plumbing Code. In 2009, the International Code Council launched development of a new International Green Construction Code (IgCC) to develop a model code focused on new and existing commercial buildings addressing green building design and performance.
- **U.S. Green Building Council (USGBC):** In 2000, the USGBC issued the Leadership in Energy and Environmental Design (LEED) certification system, designed to provide “a framework for identifying and implementing practical and measurable green building design, construction, operations and maintenance solutions.” These standards exceed minimum standards and offer a label for those who choose to go beyond the basics to build and operate green and sustainable buildings.
- **American Rainwater Catchment System Association (ARCSA):** Dr. Hari J. Krishna

founded ARCSA in Texas in 1994 to promote rainwater harvesting in the United States. In 2009, ARCSA developed Rainwater Catchment Design and Installation Standards, which is the first national standard on rainwater harvesting and provided the foundation for both IAPMO and ICC to adopt rainwater-harvesting standards in their codes. ARCSA recently agreed to collaborate with the American Society of Plumbing Engineers to submit the rainwater design standard for approval as an American National Standards Institute standard—a first for the rainwater harvesting industry.

These organizations have contributed to the development of rainwater capture or “harvesting” policies and programs across the country. Many states have addressed rainwater capture issues in recent years. The Colorado debate received the most attention, as its legislature adopted a statute that allowed rainwater harvesting only for those who had groundwater pumping permits. Colo. Rev. Stat. § 37-90-105. *See also* Colo. Div. of Water Res., “Rainwater Harvesting,” <http://water.state.co.us/DWRDocs/News/NewsArticles/Pages/RainwaterHarvesting.aspx>. Other states have amended state plumbing codes (Oregon and Georgia), issued a rainwater-harvesting manual (Texas), recognized its use but disclaimed state responsibility (Hawaii), or allowed rainwater capture without requiring a water right (Washington). Some water-short countries require rainwater capture systems in all new construction (e.g., Bermuda). Most recently, the city of Atlanta adopted an ordinance allowing and imposing a permitting system for *potable* use of rainwater, under certain conditions—a first in the United States. Section 1300, Atlanta Plumbing Code.

II. Development of Building Codes in California

A. Codes and Competition

California building codes date back to early in the twentieth century. For 60 years, conflict developed because of differing state and local codes. Finally, in 1970 the state housing law changed to preempt all

local building codes and set a unified state standard, adopted by the California Building Standards Commission (CBSC). Beginning in 1995, California experienced what some called a “code war,” when some model building codes designated by statute to provide the basis for the California Building Standards Code ceased publication. Suddenly, the commission had to choose between competing model building codes, which led to litigation and a long protracted political battle. Finally, in 2007, the CBSC determined that it would use ICC codes for the California building and fire codes, and would continue its historical reliance on IAPMO for the California plumbing and mechanical codes. In 2008, California enacted legislation to prevent the “code wars” from resurfacing by confirming and setting the CBSC’s 2007 designations of model codes in statute. *See* Cal. Health & Safety Code §§ 18938.3, 17922.

B. The Green Codes

As environmental concerns emerged in the 1970s and 1980s, the codes began to reflect methods to counter environmental impacts from construction and development and to promote environmentally friendly technology. While plumbing and mechanical codes were initially focused on public health, safety and performance issues, concerns regarding energy efficiency, water efficiency, and other environmental impacts began to be addressed in the IAPMO plumbing and mechanical codes. Water-efficient plumbing fixtures and more energy-efficient heating and cooling systems were mandated, and refrigerants that damage the ozone layer were eventually banned. By the early 1990s, the IAPMO codes added standards for the use of gray water and recycled water, and standards to address indoor air quality. Other codes were also developed to address specific environmental concerns. IAPMO adopted the Uniform Solar Energy Code in 1976. In 1978, the California Energy Commission began regulating energy efficiency in buildings through the adoption of the California Energy Code.

The building standard codes, however, traditionally set forth only minimum building standards requirements. With growing attention to climate change and carbon impacts, a new breed of building standards was

developed by organizations such as the USGBC, which created the LEED rating system. Rating systems like LEED encourage builders to exceed minimum requirements by creating a voluntary marketing brand that certifies a building is “greener” than most buildings and has complied with some combination of green building practices selected from a broad menu of options.

In 2008, the California Building Standards Commission blurred the line between building codes and rating systems by adopting the California Green Building Standards Code (CalGreen). CalGreen incorporated both mandatory minimum green building requirements and created a voluntary CalGreen tier 1 and tier 2 branding system to encourage builders to exceed minimum requirements. CalGreen also permitted local jurisdictions to adopt the tier 1 or tier 2 requirements as minimum requirements.

In California, there was some debate as to whether the state should adopt CalGreen, as some, including environmentalists, thought adopting state green building standards might undermine and compete with the USGBC and the LEED program. Once the hurdle of the initial adoption of CalGreen was passed, however, the USGBC and others have participated in the ongoing process of updating and strengthening this code.

III. Building Code Battle: Rainwater Capture

AB 275, authored by Assemblyman José Solorio, sought to clarify that rainwater capture in California was authorized for both outdoor and indoor use. Initially, AB 275 included three basic points. It

- authorized landscape contractors to be general contractors for rainwater capture systems in landscaping projects,
- defined rainwater as outside the scope of water requiring a water right for use, and
- allowed landowners to capture and use rainwater on their property, subject to the conditions imposed by local agencies with programs promoting rainwater capture, for both outdoor and indoor uses.

A 2010 version of the bill was limited to outdoor uses of rainwater, but it was vetoed due to financing concerns. That same year, IAPMO, whose model code state law sets as the foundation for the plumbing code, adopted standards for indoor use of rainwater in their Green Plumbing and Mechanical Code Supplement. IAPMO's adoption addressed the concern that there were no building standards for indoor rainwater use, and allowed AB 275 to expand to authorize indoor uses.

The original bill drew largely on the 2010 bill language, and introduced authorization of "rain barrels" without any need for a permit. The bill also introduced a definition for a "stormwater capture system," although it did not provide any substantive authorization for such systems. As the bill progressed through the legislative process, Assemblyman Solorio addressed each concern with bill language, regarding mosquito abatement, civil engineers, water supply agency notice, combined sewer/stormwater drainage systems, public health, rain barrel design standards, and IAPMO rainwater plumbing standards. Solorio eliminated all substantive opposition.

The ICC opposition that led to the governor's veto arrived in the last committee in the second house, the Senate Committee on Environmental Quality. From early in the process, ICC had urged Assemblyman Solorio to give its green building code equal billing with IAPMO, but it had not formally opposed the bill. ICC supported rainwater capture but wanted its code to gain exposure on rainwater capture in California. ICC brought in its ally, the Laborers Union, to counter the bill's support from IAPMO and unionized plumbers. The Environmental Quality Committee staff expressed support for including IAPMO standards to protect public health and declined to also include the ICC green building code in the bill due to the preexisting statutory designation of IAPMO codes for plumbing standards. ICC opposition, however, continued to be intense. Despite ICC opposition, every committee and the assembly voted unanimously to approve AB 275. (One Republican senator changed his vote from aye to no at the last moment, just as it was about to pass off the senate floor unanimously.)

On the last night of the legislative session, the Laborers Union called the governor personally and asked him to veto AB 275, which was then on his desk. In the following weeks, the governor's office asked many detailed questions and heard from many rainwater capture advocates. The governor waited until just before midnight on the final day to veto AB 275, explaining that he wanted to let the existing CBSC process take its course. While AB 275 addressed far more issues than interim building standards, the business competition between green building standards publishers ultimately defeated this second attempt to allow rainwater capture in California.

Competition among these code businesses has resulted in greener and more environmentally friendly model codes and rating systems. This same competition, however, has interfered with progress, at least in California. The initial opposition to the adoption of the CalGreen code and the last-minute veto of AB 275 reflect this competition. As state and local governments across the country adopt green building codes, this competition may continue to impede progress in green building standards and development.

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BUILDING GREEN ON URBAN SITES

Dante J. Romanini

What exactly does it mean to build “green” in today’s urban environment? That is one of the questions that the board of trustees of the Camden, New Jersey, charitable entity, the Cathedral Soup Kitchen (CSK), asked itself when it was considering constructing a new inner-city facility with a sustainable design. Through its efforts, that question was eventually answered, and CSK was able to successfully build and occupy a new building constructed with sustainable building concepts. It accomplished this through the coordination of a number of disparate resources that dovetailed with those sustainable techniques. The product of that process is a permanent home to carry out its mission to serve the disadvantaged. This article describes how that was achieved and suggests some principles for how it can be accomplished in other urban locations.

As a nonprofit organization that has been providing hot meals to the needy residents of Camden for 35 years, CSK had an urgent need to acquire a permanent location for its programs. It currently feeds dinner to more than 350 people each day and conducts other nutrition, job training, and health care programs. But because it lacked a permanent facility, for years it was forced to conduct those programs in borrowed space in a variety of places throughout the city. In an effort to realize its goal, it purchased an abandoned property with an eye toward constructing its permanent home.

Camden is New Jersey’s poorest city and the city administration has been attempting to revitalize it through the use of designated redevelopment areas under the New Jersey Local Housing and Redevelopment Law, N.J.S.A. 40A:12A-1 et seq. (LHRL). Unfortunately the location that CSK purchased was in one such area and thus was subject to eminent domain acquisition for the construction of an office park adjacent to the corporate headquarters of the city’s last Fortune 500 company. Therefore, CSK had to look elsewhere for an appropriate site. It did so successfully by coordinating a variety of public and private resources unique to urban settings to make the project viable.

It is no secret that the current economic conditions have heavily burdened real estate development. However, prior to the recent recession, a new development trend had begun to emerge in cities across the country—the redevelopment of neglected urban sites. This was a welcome change in cities that had been forced to deal with decades of residential flight, losses of industrial and manufacturing bases, and general aging and decline of their properties. Prospective developers had slowly begun to see the benefits of locating their projects in older areas because of a combination of factors, such as the availability of land, difficulty in obtaining approvals in undeveloped areas, and new government incentives for redeveloping urban properties.

It is because of these factors that urban sites are often ideal candidates for the construction of projects using sustainable techniques. Many of the property characteristics that the green building movement attempts to take advantage of are found in these urban locations. These characteristics include the reuse of previously developed sites rather than disturbance of virgin land, remediating and reclaiming contaminated properties, and development that minimizes other environmental concerns.

The successful CSK project demonstrates how an urban site can be developed using sustainable building principles by tapping into a variety of available laws and programs. And the process it used reveals how the management of those types of resources can lead to sustainable redevelopment of other urban sites, no matter where they are. Almost every state or local jurisdiction has statutes, ordinances, or other programs, akin to what CSK used, which can be utilized to make a similar project a reality. Learning how to harness those resources is a necessary aspect of building green on urban locations.

CSK initiated the project by negotiating with the city for a new site. Because site control is critical for any project, the charitable organization sought and was able to negotiate a “swap” of its existing property for another already owned by the city. This acquisition was an important first step in the process.

CSK then utilized certain provisions of the LRHL to enter into a redevelopment agreement that would allow it to obtain its new site and be reimbursed for some of the financial losses it sustained in giving up its original site. This redevelopment negotiation was a crucial undertaking, not only because CSK obtained the new property, but also because the LRHL has provisions that permit a developer to garner other public and private resources by enabling it to tap into additional programs that would otherwise not be available. This method of using one available statutory mechanism to “piggy-back” onto others was a key factor to the project’s success.

Ironically, the fact that the proposed site was also a brownfield meant it positively impacted the process CSK eventually sought to undertake in its sustainable building initiative—LEED certification. As many readers will know, LEED is an internationally recognized green building certification system, providing third-party verification that a building was designed and built using strategies aimed at improving performance across a variety of sustainable criteria such as energy savings, water efficiency, CO₂ emissions reduction, improved indoor environmental quality, and stewardship of resources and sensitivity to their impacts (*See* U.S. Green Building Council; www.usgbc.org). Thus by redeveloping a brownfield, CSK enhanced its LEED credentials.

Despite the benefit to the LEED process, because it was a brownfield, the new site presented several design and construction challenges. As the location of a former hardware store for almost 100 years, it was laden with environmental issues. Also, significant demolition work was required to remove the old structure and foundation and prepare the property for the new facility. Interestingly, these factors also promoted the LEED certification process since LEED criteria place great importance on the use of “sustainable” sites.

Site selection and management of that site during construction are important considerations for a project’s sustainability under LEED criteria, and CSK utilized this fact to its benefit. The fact that this site was not virgin land made it very valuable in the LEED

analysis protocol. It was, in fact, a previously developed but severely neglected urban location that was being reused and in the process remediated of its existing contamination.

The existence of contamination on the site also necessitated the second phase of the sustainable development process—remediating the contamination. The CSK team identified a variety of options as potential sources of funding to pay for that effort and was successful in obtaining money from three of those sources to carry out the work. Here, again, the inter-ordination of a number of these resources was a notable factor in making this project viable.

The remediation process itself required identifying the extent of the contamination. This task was funded through \$35,000 from the New Jersey Hazardous Discharge Site Remediation Fund, which provides investigation and cleanup funding to certain eligible properties. Using this source of financing, CSK identified and took advantage of a public funding source for one of its major problems. Site demolition, remediation, and site preparation were then undertaken, funded by approximately \$200,000 from another state funding source and \$100,000 in eligible federal Housing and Urban Development (HUD) Community Development Block Grant funds. 42 U.S.C. 5301; 24 C.F.R. 570.1 et seq.

CSK was also fortunate to be able to assemble a project development team that was instrumental in making this sustainable construction project a reality. Not only did it have a valuable group of architects, engineers, and construction industry people who were anxious to contribute to this unusual undertaking, but CSK also had the services of a volunteer LEED-certified architect who advised it on proper procedures for obtaining LEED points. Since the LEED certification process consists of a system where points are awarded or denied for each phase of the construction project from the early planning stage to final occupancy, CSK was required to consider and utilize sustainability-based materials, procedures, and processes, from the initial planning and design all the way through final construction and occupancy, and to document those efforts.

The money for the actual construction of the new CSK facility was in part funded by publicly based financing of \$900,000 from the New Jersey Economic Development Authority. Further private financing was obtained through a loan from PNC Bank, which committed to it as part of its Community Reinvestment Act obligations. This federal statute requires financial institutions to serve all facets of their community, including low-income and minority populations, with capital investment and loan availability. 12 U.S.C. 2901 et seq.; *See also Lee v. Board of Governors of the Federal Reserve System*, C.A.2 1997, 118 F.3d 905.

The remaining construction costs were provided by CSK's private donors and grants from other entities, which were available because of the nature of the project. The individual and institutional sources of these funds were attracted by the appeal of being involved in a project that was both charitable and sustainable. Some of these donors were drawn to the charity because they were impressed with CSK's ability to pull together the disparate resources to undertake the green initiative. Thus, because of the sustainable nature of the project, CSK was able to reach a donor base that otherwise might not have had interest.

As it moved forward with the project, the CSK team came to realize that many of these financing sources were only available due to the fact that the project was being constructed in an economically depressed urban area. Since it is the poorest city in the state, Camden's plight was such that few "normal" financial channels likely would have been on the table. In effect, the dire economic condition of the urban locale provided a basis for the generation of many of these otherwise unavailable sources of revenue.

The sustainability of the project also incentivized local and state government officials to be more reasonable in their requirements for development approvals. Indeed, some agencies utilized the positive publicity generated by the project. Thus, the LEED certification and brownfield redevelopment process ended up being attractive not only to the private donors but also for regulators and governmental funding sources. One state agency even publicized the project as a "poster

child" of sorts on how urban brownfield redevelopment could be accomplished.

The New Jersey Department of Environmental Protection (NJDEP) was necessarily involved in the project because of the environmental issues on-site. However since the project demonstrated that a successful brownfield redevelopment project was achievable in the state's poorest city, NJDEP later used it in promotional materials as an example of how an urban brownfields project could be viable. Thus both the private and public entities involved in the project were enamored with the idea that a "green soup kitchen" was being built in an urban environment.

Consequently, in the course of this undertaking, the development team learned that the sustainable aspects of a project could lead to greater public and private investment interest. It is more attractive to public entities that provide public financing because "building green" has become a highly valued concept, particularly in urban areas that have experienced years of decay. Private lenders also have interest in these projects for the same reason. The sustainable nature of any urban project enables funding sources to tout their "green credentials"—a valuable public relations or marketing asset. Some of the private foundations that provided grants for the project included Connelly Foundation, the Danellie Foundation, and Campbell Soup Foundation.

In the actual construction, in addition to the site selection and development requirements that contributed to the LEED scoring, CSK also employed a variety of sustainable building techniques. These included the use of large amounts of natural light and the inclusion of many green building products like recycled steel and wood-look plank flooring made from recycled tires. The building also took advantage of its location on a major bus route; the use of low-flow faucets and toilets with automatic controls; waterless urinals; low VOC paints, carpet, adhesives, and sealants; motion-sensitive light fixtures and switches; white reflective roofing; the use of water runoff for landscaping; the use of timers and energy-efficient fixtures; and the use of regional materials in the construction.

This entire effort garnered support from a number of corporate and private foundations that found this to be an enticing charitable cause because of the unique factors that made up the project. As one example of this interest, in June of 2010, when the Sustainable Agriculture and Food System Funders (www.safsf.org) held its annual forum across the river in Philadelphia, they offered attendees a tour of the facility led by representatives from the William Penn Foundation and the Geraldine R. Dodge Foundation.

Today, over three years after construction was completed, the CSK continues to serve its community but now from its new permanent home, the construction of which was made possible through the successful coordination of available public and private funding sources, coupled with the generosity of private donors. Most importantly, the sustainable nature of the project played a critical part in this success, since that was the impetus for many of the contributors to become actively involved.

CSK's project reveals several important factors about sustainable development in urban areas. There are many opportunities available, although initially it may not seem that way. Though different development obstacles may exist in urban areas compared with undertaking a project on an undeveloped site, unique economic incentives and resources often exist in urban locations that would not be available elsewhere. Some of the funding sources for the CSK project probably would not have come forward if the project were located on a suburban property. This is a factor that is not unique to where CSK built its project. Rather it is a concept that can be taken advantage of in many jurisdictions.

There are also a variety of resources that can be utilized to overcome perceived obstacles when developing property sustainably in urban areas. Since state and local governments have been trying for years to rebuild their decaying cities by attracting new projects, they have made many resources available to potential developers as incentives to undertake such projects. However, these existing resources need to be properly identified and coordinated. This aspect of the urban development process is key, particularly when

sustainability is a goal. Indeed, using sustainability as a marketing tool can lead to more financing opportunities.

The CSK experience also demonstrates that when developing in urban areas it may be unlikely that a sole source of revenue will provide enough support to address a project's entire financial needs. Urban sites typically have more acute development hurdles that must be addressed, and in order to do so, a developer will likely need to look in more than one place to find a solution. Potential environmental contamination, neglected infrastructure, lender skepticism, and political issues are just some of these concerns. At the same time, these factors are the very things that sustainable building practices seek to take advantage of. CSK's project shows that seeking a number of complementary resources may work to meet the overall requirements for a development. Development issues on urban sites may seem daunting at times, but they are not more numerous than those present at other locations, simply different.

While the CSK effort was somewhat unique because it is a nonprofit, the project is instructive because of how and where its completion was accomplished. The real lesson to be taken away is the fact that CSK was able to overcome what initially seemed like insurmountable problems using a successful coordination of a broad range of funding sources and programs. By doing the same, any urban developer can maximize its resources and in the process build a sustainable project that can be used as an asset to attract more resources. In the current economy, this is a lesson that can be learned by anyone seeking to build sustainably in older cities, no matter where.

In the end, although CSK has constructed its facility to meet and be eligible to garner the necessary points for LEED certification, and had registered the project for that purpose, the required documentation necessary to obtain the certification with the U.S. Green Building Council, including the commissioning process, was estimated to cost CSK an additional \$20,000. The lack of funding for this task has prevented the nonprofit from moving forward on it thus far, especially in light of the many other important financial needs the

organization has. However, readers can see the finished “green” building for themselves by going to the charity’s Web site: www.cathedralkitchen.org.

While the CSK project may not be a typical development, the process it used to construct a green inner city building is a model that could be adapted for any sustainable urban construction project. CSK’s vision was fueled by the project’s sustainability and its construction was accomplished through a coordination of both private and public resources. Challenges will always exist in older urban areas. Nevertheless, urban locations may provide some of the best opportunities for developers to build sustainably. Perhaps the approach that was successful for the Cathedral Soup Kitchen is worthy of emulation.

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Call For Nominations

The Section invites nominations for the following four awards that will be presented at the ABA Annual Meeting in Chicago, in August 2012. Nominations for these three awards are due by May 14, 2012.

- *Environment, Energy, and Resources Government Attorney of the Year*
- *Law Student Environment, Energy, and Resources Program of the Year*
- *State or Local Bar Environment, Energy, and Resources Program of the Year*

Nominations for this award are due by March 30, 2012.

- *Award for Distinguished Achievement in Environmental Law and Policy*

Additionally, the Section will present the *2012 ABA Award for Excellence in Environmental, Energy, and Resources Stewardship* at the 20th Section Fall Meeting in Austin, October 10-13, 2012. Nominations for this award are due by June 18, 2012.

For more details about these awards, please visit the Section Web site at www.ambar.org/EnvironAwards.



A LAWYER’S VIEW INSIDE LEED

Neil C. Johnston

After several years of considering an addition to our house on Mobile Bay, my wife Ashley and I decided to go for it. The existing house is approximately 1,200 square feet on Mobile Bay, only 45 feet from the bay. It is pile supported with an asphalt shingle roof, some batten insulation (not much), double pane windows, 2 bedrooms/1 bath, and an AC unit that never stops. We needed more room!

We did not initially plan to build a LEED-certified addition, but an upgrade and energy efficiency were certainly going to be included. Once we jumped over the ledge, we ditched the idea of an addition to the existing house in favor of a separate parents’ house to be attached to the existing house by a covered breezeway. That way, we figured we could have some quiet time (under separate lock), allowing the “kids” and their people use of the existing house.

Storms are of great concern—especially hurricanes—and must be taken into consideration. Any structure must be sturdy and meet new Katrina flood elevations and wind requirements. The architect, Chatham Home of Fairhope, designed a 1,700-square-foot house and breezeway, raised on pilings and using a portion of the existing lot adjoining the existing house. Fairhope and Baldwin County use the 2006 International Building Code, which required our pilings to be driven 15 feet below the surface. Due to the revised base flood elevations, the bottom of the first floor is now 13 feet above grade. Soil borings showed sand down below the 35-foot core even though we are essentially in the Mullet Point swamp. We happen to be on a sand dome.

By the time we received the engineer’s review of the house plans and report, we realized that many of the features and requirements would be top-notch energy efficient, be extremely durable, and meet LEED criteria.

While I was familiar with the different energy-efficient products and various certification programs, Ashley

and our contractor, John Ladd, and his subcontractors were not. They were not so sure that they wanted to go through the LEED process, especially after we hired LEED consultant Catherine Hall (a friend of ours whom I have worked with on various conservation programs). Catherine required a preconstruction orientation, education, and a walk-through of all the details, qualifications, and prerequisites—all to obtain a half credit here or one credit there. Many of their comments and questions in the beginning were “Why are you doing this?” “Are you sure you want to do this?” “This doesn’t make sense!” “Huh?” “We don’t do it that way.” “Okay, but that costs more.”

This would be a common theme in the beginning stages, but I laid down a few rules: first, the project would be built using LEED criteria; second, each phase of the project had to be affordable and something that could easily be duplicated; and third, we were going to use solar and wind.

Not long after the pilings were in and the framing began, it became apparent to me, our contractor, John Ladd (a friend but also a stickler for the utmost detail and precision), and our “framer,” Danny Paul of Manu Forti Construction (an experienced builder more precise than John, if that can be), that there might be some extra hoops, but most of the building materials, construction, housecleaning on the job site, and other matters were going to be done their way. That meant they would have qualified for LEED points anyway.

As an owner, I was involved with every aspect of the project and on the job site almost every day, talking with the LEED consultant, Catherine, and working with Ashley on the energy-efficient appliances, lights, plumbing, HVAC, and the recycled materials. Ashley and Catherine became closer as the house evolved from a frame on pilings to walls wrapped three times with 30 pound felt, insulated and sealed with closed cell foam in the ceilings, all walls, the floor, attic, and around each window, and further reinforced and insulated with Hardie board siding, a hard concrete-type material. At least 4,000 metal hurricane straps were used, and there’s no telling how many nails, screws, and bolts.

Catherine helped Ashley, the contractor, and the subcontractors to understand each element of the LEED process, especially the requirement of documenting each phase, each type of material, and obtaining certifications of the processes. Catherine also helped us understand the conservation aspects of LEED: using products and materials in close proximity to the job site (within 500 miles) to reduce transportation, fuel, and associated emissions. We located heart pine flooring that had been milled locally from planks that came from a commercial pier being reconstructed in New Orleans. The flooring, countertops, and tubs in each bathroom are Alabama white marble quarried in northern Alabama.

Reuse of materials and use of recycled materials were very important and resulted in our excursions to local antique door and furniture warehouses such as Charles Phillips Antiques in Theodore to find literally “old” pine doors, some 8 feet tall, some 10 feet tall and some in between, dating back to the 1880s from plantation houses in the Ukraine (we actually found them in Mobile, Alabama). Even with comments like “a new door would not have so many rotten spots,” we stayed the course.

Some suppliers were familiar with environmentally friendly products and low-VOC chemicals, but the inventory just did not exist in the immediate area; there have been few LEED projects, and the demand is low, at least for now. We hope to change that situation. Each product, paint, stain, glue, and foam, was checked for qualifying compounds, and each subcontractor was required to use “low to no” VOC materials. This included the floor sealants, the door stains, the insulation, the adhesive for marble countertops and bath floors, and the interior paints.

We have maximized “affordable” appliances using Energy Star kitchen appliances as well as the clothes dryer and low flow washer. All lighting uses LED fixtures and bulbs (another issue Ashley had to overcome). Energy Star-rated HVAC has been installed but was not charged until the last phase to keep dust out of the ductwork. HVAC vents and ducts were sealed throughout the project. In fact, we used small AC window units—which we fondly call

“hurricane units”—to keep the interior cool and acclimated during the inside finishing processes. This became a favorite break area for the subs during the 95-degree-plus heat of summer. We also installed low flow toilets and faucets, double pane radiant windows, and a solar water heating system using photovoltaic panels that actually service the old house and the new house. We maximized use of natural light with plenty of windows in each room, which are double pane for insulation, impact resistant for hurricane and wind protection, and reflective to reduce radiation.

New roofing, siding, and covered walkway made a substantial difference in the insulation efficiency of the old house and contributed to the efficiency of the new house. All these features evolved during the process. There was a change in the roofing material on the old house from asphalt shingles to the same light-colored, heat reflective metal roofing we were installing on the new house. While changing the roof materials, we extended the eaves to include a covered elevated walkway along the south side of both houses for shade and covering. Each house is now covered with Hardie board siding replacing the old, and in some places deteriorated, wood siding on the old house. By replacing the siding and sealing all cracks in the old house, we were also able to create a “bat free” house. Hundreds of bats left the old house when the wooden siding was removed.

Other matters that required our attention included the amount of recycled fly ash in the concrete slab under the new house, and the use of sand and gravel for the drive and parking to control on-site water and encourage percolation on-site. We removed exotic plants (Chinese tallow and oleander), and installed landscaping with native grass and bald cypress, which love water, can tolerate salt (from storm surges), and are drought tolerant.

When the certification process is complete, and we are LEED certified, we will have the first LEED certified waterfront house on Mobile Bay or any waterway in southern Alabama. It will be one of only a handful of LEED buildings in southern Alabama. To document the process, we have also collected volumes of paper to submit to our LEED rater, Joe Cooper of Ecosouth.

We have taken hundreds of photographs and plan a Web site (one of the LEED alternatives requirements). We’ve already been the subject of a news article in the *Mobile Press Register* and photo scrapbook: (http://blog.al.com/press-register-business/2011/09/energy_efficient_house_under_w.html), (http://photos.al.com/4464/gallery/real_estate_lead_certified_house_on_mobile_bay_2011/index.html).

As a lawyer looking at the process, I skipped over and ignored advice I would have given. Many of the processes and agreements were not made preconstruction, and we found ourselves actually negotiating on the job and using that good old handshake contract in many (but not all) instances. There is absolutely no substitute for the hands-on apprentice-like experience on-site to develop an appreciation (even more than before) for the detail, need for evidence, requirements for preconstruction planning, contracts, and documentation, as well as the continuous documentation of all of the processes.

There are certainly changes and things we will do differently next time, but it was a very interesting, enjoyable, and satisfying process. Our teams really did work well with each other. Our future plans include more solar panels, a wind turbine (gotta have one) and assisting friends and clients through the process. Oh, and about the affordability aspects . . . we’re still working on that.

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APPLYING OLD METHODS TO NEW VALUES: CONSIDERATIONS FOR GREEN LEASES

Ralph A. DeMeo and Jacob T. Cremer

Commercial leasing firms and agents are becoming more adept at using the green building movement as a business strategy and marketing tool. Many companies report that their shareholders and customers are pressuring them to green their portfolios. By 2009, 82 percent of large American corporations were expected to have “greened” 16 percent or more of their real estate portfolios, and 18 percent were expected to have greened 60 percent or more of their real estate portfolios. Susan Coleman, *Green Leasing*, 569 PLI/Real539, 541 (2009) (citations omitted).

Even in these slow economic times, the green building movement is still relevant because it can help landlords and tenants reduce building operating costs. Yet, even today, when advertisers call everything from coal to Barbie green, the green lease may seem like unfamiliar territory. Green leases, which are simply leases of space in green buildings, are after all based on new (and constantly changing) green rating systems. See Geoffrey White, Joshua Nichols & Jeff York, *Green Building Rating Systems and Green Leases*, 41 ENVTL. REP. NEWS & ANALYSIS 10049, 10057 (2011). Upon closer examination, however, we see that, while the systems may be new, the methods are not. Green leases are actually surprisingly familiar: the position of the landlord vis-à-vis the tenant is the same as ever.

Do green buildings and green leases lead to new or unsuspected liability on the part of landlords, builders, and others? A recent panel of knowledgeable attorneys convened by the U.S. Green Building Council was skeptical. Instead, the panel called green building liability “new wine in old bottles.” Liability could be limited through a combination of experiential knowledge and contracts—distinctly old-fashioned methods. Brendan Owens, *Building Green: The Legal Risk in “Building Green”: New Wine in Old Bottles?*, 565 PLI/Real 41 (2009).

I. Green Certification and Credentialing Systems

Green leases are usually intended to function alongside a current or future green certification of a building.

Consequently, it is worth briefly considering those certification systems. Because construction methods, building materials, and architectural design are constantly evolving, green building is best understood as a malleable concept, rather than as a strict theme. These systems measure performance by using benchmarks to evaluate the environmental impacts of development. The six most common benchmarks are site location, energy conservation, water conservation, material selection, indoor air quality, and building operations and maintenance.

In some cases, state and local governments mandate these performance standards in order to increase construction and operation of green buildings. For example, in 2008, Dallas adopted a green building ordinance that incorporates Leadership in Energy and Design (LEED), Energy Star, and American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) standards.

By far, the most well-known system in the United States is the U.S. Green Building Council’s (USGBC) LEED program. LEED was developed in 1993 and updated in 2009 to version 3.0. It is a voluntary point-based system used internationally as a third-party green building verification system. It evaluates all six of the standards mentioned above by awarding points for various performance levels. LEED certification is achieved at different levels depending on points accumulated.

LEED now encompasses a wide universe of services and procedures, including an appeals process for certification decisions, numerous professional certifications, and multiple issue-specific rating systems. LEED evaluates commercial and residential buildings, and it can be used through a building’s life cycle—design, construction, tenant build-out, operation, and renovation. Recently, it has even been extended to neighborhood design by evaluating community planning and design.

Other important green building rating systems include:

- BREEAM, established in 1990 by the Building Research Establishment in the United Kingdom, which is similar to LEED but is more widely used outside the United States;
- Green Globes, an online building assessment tool used for new and existing residential and

commercial structures developed in the United Kingdom and Canada, which is supported as a standard by the American National Standards Institute (ANSI);

- Energy Star, a system originally for rating appliances and electrical devices developed by the U.S. Environmental Protection Agency and the Department of Energy, which has been expanded to include whole-home and commercial building efficiency;
- GGHC, the leading green building initiative in the health care industry, created by the American Society for Healthcare Engineering in 2002, which is a self-certifying system that borrows from LEED; and
- Standard 90.1, a building energy-rating system, developed by the ASHRAE and other industrial organizations.

See White et al., at 10053–56. Another aspect of the green industry that may be relevant to a green lease is whether the professionals involved in the project have green credentials. Not only are buildings becoming greener, but lawyers, accountants, and other professionals are also doing so. Although there is still a good deal of debate on the value of these credentials, by 2009 there were more than 100,000 LEED-certified professionals (by far the most important credentialing program). Real Life Leed, <http://www.reallifeleed.com/2009/04/its-official-100000-leed-aps-worldwide.html> (Apr. 22, 2009).

The LEED professional credentialing program has recently been overhauled. The most significant update is a membership system, where each tier has specific eligibility requirements and continuing education requirements. The new program is catching on quickly: within one year of its release, LEED certified more than 10,000 Green Associates. Green Bldg. Certification Institute, GBCI Celebrates 10,000 LEED Green Associates, http://www.gbc.org/org-nav/announcements/10-08-18/GBCI_Celebrates_10_000_LEED_Green_Associates.aspx (Aug. 18). There are three tiers:

- A LEED Green Associate demonstrates competence in understanding and supporting green design, construction, and operations.

- A LEED AP+ demonstrates depth of knowledge and experience in one of several particular fields, including commercial building design and construction, commercial operations and maintenance, commercial interiors, residential design and construction, and neighborhood development.
- A LEED AP Fellow demonstrates special leadership and longtime service in the green building and design field.

II. Green Leases

Because most corporate space in the United States is leased, green leases are a natural consequence of the green building movement. Recall that a green lease is a lease of space in a green building. There is no legal definition of a green lease. Generally, a successful green lease encourages green goals or objectives through cooperation. Leases can be as simple as a boilerplate lease with a few sustainability concepts added, or they can be much more complex, adding measurable performance standards, allocating costs depending on which party acts to conserve energy costs, and providing the parties with specific remedies if the other fails to perform its green obligations. See, e.g., Jonathan Cohen & Theodore I. Yi, *Green Leasing from the Tenant's Perspective: What to Look for and What to Avoid*, 571 PLI/Real315, 317 (2009).

Landlords are interested in implementing green leases for a number of reasons, including marketing efforts, increased rental income, claiming tax or carbon credits, receiving government subsidies, or complying with state and local energy conservation laws. Because of these interests, landlords will want build-out (i.e., completion) standards that ensure the building's eligibility for green certification, maintenance, and repair obligations that comply with certification standards, and costsharing for green certification or conversion to alternative energy sources and other conservation measures.

Green lease tenants face a number of issues that could put them at odds with a landlord. Generally, tenants want the lease to give standards for how the building or space will be delivered, to explain how the tenants'

actions affect green ratings or credentialing, to require costsharing for installation and operation of any special monitoring equipment, and to allow for self-help remedies if the landlord fails to achieve or maintain specified sustainability standards. On the other hand, tenants usually will want to avoid the disproportionate pass-through of building-wide sustainability costs, requirements to obtain utilities from the landlord, and allowing the landlord to limit its obligation to ensure that the building and its systems meet sustainability standards. *See* Cohen & Yi, *supra*, at 318–20.

As these different interests make clear, the biggest challenge to both parties in implementing a green lease is to align incentives properly. For example, the pure (or triple) net lease, which is especially common in commercial real estate and passes on the costs of real estate taxes, building insurance, and maintenance to the tenant, does not encourage the landlord to invest in conservation measures because the landlord will not share in the savings. On the other hand, a pure gross lease encourages the landlord to lower operating costs because the landlord pays all those costs, but the tenant is not encouraged to moderate or conserve use. To solve this problem, many green leases use a modified gross lease that sets a base cost, which the landlord pays, and the tenant pays the increment above that base cost.

Enforcement of green leases may also be problematic. Some leases are accused of being “greenwashed,” where they simply provide a tenant with a green how-to handbook, with no performance standards or enforcement mechanisms. But how can a green lease have enough teeth to correct a wayward party? Consider that, although a tenant’s breach could result in the loss of green certification, a green tax credit, or business goodwill, traditional legal remedies would have to suffice for the landlord because courts seem unlikely to consider many green lease provisions as serious enough to warrant an eviction remedy. *See* Ronald W. Ruth, *In the Spotlight: Enforcing the Green Lease*, 22(5) COMM. LEASING L. & STRATEGY 1, 1 (2009). As a solution, a lease might prescribe its own dispute resolution mechanisms to correct the tenant’s actions. A simple lobby wallboard showing, tracking, or ranking various utilities or other statistics may be effective. For some disputes, liquidated

damages or “additional rent” could be assessed against a green security deposit. For more serious disputes, a predetermined, impartial third party sharing green values could be used to review disputes and facilitate compliance.

Like any lease contract, landlord and tenant wish lists may not prove practicable because they are oftentimes not in the interests of both parties. There are, however, some practices that both parties will probably want to include in a robust green lease:

- Use of sustainable materials, cleaning products, and maintenance procedures
- Recycling requirements, where the landlord must provide a system and the tenant must participate
- Specify who pays for green building insurance, or for the increment above standard property insurance
- Flexibility to account for the seemingly ever-changing certification standards
- Milestones for reevaluation of conservation goals and achievements

See generally Ellen Sinreich, *The Greening of the Retail Lease: 10 Tips for Landlords and Tenants*, 573 PLI/Real 143 (2009).

III. Conclusion

This brief article has introduced the risks, rewards, incentives, and costs of green leases. The normal tensions in the landlord-tenant relationship mean that green lease provisions can be written best by applying old methods to society’s new green values. Clarity of forethought still reduces the frequency and consequences of problems. In the end, a successful green lease must give both the landlord and tenant incentives to conserve energy, reduce waste, increase recycling, and use environmentally friendly products and materials.

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