

## U.S. Green Building Council

# Meeting the Challenges of Building Green with LEED

by Harry E. McLellan III

**I**n the shadow of New York City's second tallest skyscraper at 1 Bryant Park, which was recently awarded the U.S. Green Building Council's (USGBC) highest level of certification under its Leadership in Energy and Environmental Design rating system (LEED), many are questioning just how eco-friendly LEED-certified buildings are. Despite LEED being the nationally accepted benchmark for high-performance green building, some are beginning to argue that LEED certification "could end up putting a shiny green stamp on a generation of unsustainable buildings." In fact, there is pending litigation in federal court alleging that the USGBC fraudulently misrepresents the energy efficiency of LEED buildings, and that LEED certification does not verify actual energy performance.

The USGBC emphatically disagrees with its critics by making its case in favor of LEED through a rapidly expanding list

of impressive, environmentally responsible, LEED-certified projects that are statistically proven to be energy efficient and to save money. In addition, the USGBC has implemented revised policies and procedures to ensure the integrity of the LEED certification process to advance its mission toward market transformation and its commitment to the environmental and social benefit of green building.

In 1998, the USGBC, a nonprofit coalition of diverse industry leaders, launched LEED to establish criteria for green projects by evaluating the location, design, construction and operational aspects of buildings. By applying LEED, the USGBC certifies buildings as "green" based on scores that are tallied for efficiency and design in five categories, including site planning, water management, energy, materials, and indoor environmental quality. The goal of LEED is to promote a whole building approach to sustainability that recognizes

building performance based on human and environmental health.

The USGBC offers four levels of certification, which include LEED certified, LEED silver, LEED gold, and LEED platinum. Although originally designed as a voluntary rating system for new construction of commercial office buildings, LEED is an evolving system with a variety of programs for different types of construction.<sup>2</sup>

The steps to LEED certification include registering a project, tracking progress, documenting achievement, and applying for certification. LEED registration initiates contact with the USGBC and provides applicants with access to tools and information. A project must satisfy all LEED requirements and achieve all the necessary points to earn the specific LEED certification sought.

The documentation supporting certification is submitted to the USGBC for LEED technical review. Today, this can be done online at the USGBC website. The documentation submitted for review is subject to credit interpretations by the USGBC, and the actual award of certification typically does not occur until several months after final completion of a project. The determination by the USGBC of the final LEED review is subject to appeal, which must be made within 30 days of receiving the final award.<sup>3</sup>

LEED is now recognized as the foremost program for design, construction and operation of green buildings, with over 40,000 projects currently participating in the commercial and institutional LEED rating systems, comprising over 7.9 billion square feet of construction space in all 50 states and 114 countries. In addition, nearly 10,000 homes have been certified under the LEED for Homes rating system, with nearly 45,000 more registered for certification.<sup>4</sup>

Most recently, the USGBC announced that it reached a milestone of more than

500 buildings certified through its LEED Volume Program. This pilot program streamlines the certification process for high-volume property owners by utilizing a prototype-based approach. With a prototype design certified by the USGBC, large-scale real estate firms and retailers can now eliminate the time and expense in filing documentation for each building it seeks to certify. In the past, the cost and time involved for individual buildings was a major impediment to those filing for LEED credentials in roll-out portfolios.<sup>5</sup> This program is proving to have an exponential impact on the number of buildings seeking LEED certification.

To meet the growing demand for LEED certification, the USGBC delegated the responsibility of administering the LEED building certification program, under which more than 17,000 commercial projects now await certification, to the Green Building Certification Institute (GBCI). The GBCI is an independent third-party organization that was established in 2008 and charged with ensuring that the certification and verification of buildings under the LEED rating system is of the highest quality and integrity.<sup>6</sup>

Notwithstanding the efforts of the GBCI and the USGBC to safeguard the credibility of LEED, the USGBC has recently come under fire for alleged flaws in the certification process, and for claims that LEED-certified projects are not measuring up to perceived promises of sustainability. Moreover, critics contend that the LEED rating system allows builders to take advantage of the moral high ground without necessarily being required to deliver an environmentally responsible product. Some of the criticism has even come from unexpected sources, including famous architect Frank Gehry, who a few months ago took a shot at LEED, saying that it has become “fetishized,” like “wearing an American flag pin,” and

that LEED certification is often awarded for “bogus stuff.”<sup>7</sup>

The most serious attack is an action now pending in the U.S. District Court for the Southern District of New York against the USGBC and its founders.<sup>8</sup> In the lawsuit, the plaintiffs allege that the USGBC commits false advertising and deceptive trade practices through its marketing of the LEED rating system. The complaint was originally filed on Oct. 8, 2010, and was styled as a class action suit that included many far-reaching causes of action, such as violations of the Sherman Anti-Trust Act<sup>9</sup> and the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>10</sup> On Feb. 2, 2011, the plaintiffs amended the complaint to no longer proceed as a class action suit, and withdrew some of the more inflammatory contentions and unusual causes of action. Nevertheless, the amended pleading still contends that the USGBC and others have committed “deceptive trade practices” and fraud under federal, state and common law by purportedly fraudulently advertising and promoting the LEED rating system.

In addition to treble damages and exemplary damages, the plaintiffs are seeking to enjoin the USGBC from advertising, marketing or promoting the energy efficiency of LEED, and are asking the court to compel the USGBC “to disclose the actual energy use of LEED properties.”<sup>11</sup> To date, the USGBC has not filed an answer, and it is unclear how it will respond.

Another challenge that implicated the LEED certification process itself, was a formal protest to the award of a LEED gold certification to the Northland Pines High School in Eagle River, Wisconsin. The complaint was filed with the USGBC on Dec. 23, 2008, by five individuals from the community surrounding Northland. The main contention of the challengers was that the USGBC awarded LEED gold certification to a

project that did not meet two LEED prerequisites involving energy and indoor environmental quality. The USGBC retained two consultants to evaluate the technical merits of the alleged violations by conducting a comprehensive investigation that included, among other things, interviews with the project team, a detailed review of the project's energy model, and an on-site inspection.<sup>12</sup>

In April 2010, the USGBC and its consultants concluded that they have "no reason to believe that the project failed to meet all of the LEED prerequisites and credits it has attempted." Accordingly, the USGBC did not revoke certification or disallow any credits, thereby preserving Northland's gold LEED certification designation. Many commentators have questioned the validity of this outcome, including the appellants, who recently published an executive summary response declaring "USGBC and LEED credibility destroyed."<sup>13</sup>

Based on its experience with the Northland matter, the USGBC revised its certification challenge policy to further support the integrity of LEED certification. Modifications to the challenge policy include, among other things, clarification of the appeal process with a procedure that serves as a quality check on the GBCI staff and reviewers and to assist in identifying instances in which certification has been granted based on the submission of misleading or deceptive documentation. The USGBC believes these revised policies and procedures will reaffirm the USGBC's credibility in the marketplace.

Despite these measures, in many circles LEED is no longer being accepted at face value. For example, the U.S. Department of Energy (DOE) is joining in the debate by proposing rules regarding energy efficiency and sustainable design standards for new federal buildings and major renovations. Accordingly, the

DOE is suggesting that rating systems used by federal agencies (such as LEED, which is a requirement at the silver level for all General Services Administration projects) should "(1) be subject to periodic evaluation and assessment of the environmental and energy benefits that result under the rating system; and (2) include a verification system for post-occupancy assessment of the rated buildings to periodically demonstrate continued environmental benefits and energy savings."<sup>14</sup>

Thus, for the DOE a LEED silver designation is not enough, and a movement toward objective performance results appears to be the trend.

An important issue for attorneys who follow these developments, which is not addressed by USGBC policy or in the pending litigation against the USGBC, involves disputes between and among building owners, developers, contractors, architects and engineers concerning the performance of LEED-certified buildings.

A lawsuit filed last year in New York County Supreme Court by owners of a \$4.2 million condominium unit in a 31-story LEED gold-hopeful building known as the Riverhouse in Battery Park City illustrates how this issue is beginning to emerge. The owners are seeking \$1.5 million against the project's developer and property manager, claiming breach of contract and fraud because the building is purportedly not as green as it had been advertised. The plaintiffs allege that the project was marketed as being at "the cutting edge of green technology," but after their purchase they consistently experienced cold drafts and insufficient heat in their unit. According to the complaint, an energy audit of the unit indicates that there is a deviation of 49 percent from LEED standards, and that the unit is not energy efficient.<sup>15</sup>

Some green building observers maintain that these types of claims will

become more prevalent as a result of LEED not living up to its promises of sustainability. Others argue that the claims are exaggerated and that studies show that many LEED buildings are actually performing as expected or better. According to a report issued by the Alliance for Environmental Sustainability (AES) at the end of last year, LEED-certified homes were found to have 40 percent less energy use and utility costs annually when compared to conventional homes. The study, which compiled data from 144 LEED-certified homes in the Midwest, found "LEED Homes at each level reduce the total cost of ownership, saving of tens of thousands of dollars through utility savings, during a typical 30-year mortgage period."<sup>16</sup>

In New Jersey, the Wyndham Worldwide Inc. headquarters in Parsippany, which earned a LEED silver certification, is exceeding American Society for Heating Refrigerating and Air Conditioning Engineers (ASHRAE) requirements with 16 percent energy savings for its lighting and 17 percent energy savings with its heating, ventilating, and air conditioning (HVAC). In addition, Johnson & Johnson's world headquarters in New Brunswick, which was awarded the first LEED existing buildings gold certification in New Jersey, is experiencing a 25 percent energy reduction.<sup>17</sup>

The jury is still out on the overall effectiveness of LEED. Nevertheless, the USGBC continues to successfully withstand the challenges. ☺

## Endnotes

1. Alec Appelbaum, Don't LEED Us Astray, *NY Times*, May 19, 2010.
2. *Commercial Real Estate Transactions in New Jersey*, New Jersey Institute for Continuing Education (3rd Ed. 2010), Construction and Development Section, pg 8.61.
3. *Id.* at pg 8.62.
4. *See*, <http://www.usgbc.org>, U.S.

- Green Building Council website.
5. *Id.*
  6. *See*, <http://www.gbci.org>, Green Building Certification Institute website.
  7. [www.businessweek.com/innovate/next/archives/2010/04/architect-gehry](http://www.businessweek.com/innovate/next/archives/2010/04/architect-gehry).
  8. The action was filed in the United States District Court, South District of New York under Docket No. 10CIV7747.
  9. 15 U.S.C. §2.
  10. 18 U.S.C. §1962(c).
  11. *Id.*
  12. The challengers, who include Ronald Ritzer, Roderick McKinnon, Patrick Smith, Kevin Branham, and Curt Hartwig, have made available the submissions and supporting documents, including "LEED Credi-

bility Destroyed," Complete NPHS Appeal, Horizon Report, Taylor Report, USGBC Letter, Response to Horizon Engineering Report, Response to Taylor Engineering Report and Appellants' Statement. These documents may be found as links to the website located at [www.greenbuildinglawupdate.com/2010/06/articles/legal-developments/leed-certification-challengers-speak-out/](http://www.greenbuildinglawupdate.com/2010/06/articles/legal-developments/leed-certification-challengers-speak-out/).

13. *Id.*
14. Energy Efficiency and Sustainable Design Standards for New Federal Buildings, *Federal Register*, May 28, 2010 (Vol. 75, No. 103), pg 29938.
15. The action was filed in New York County Supreme Court under Index Number 105958/10 and reported in the *Wall Street Journal* by Craig

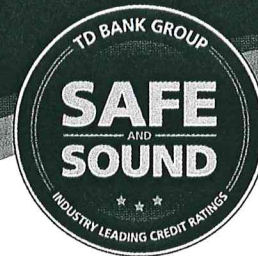
Karmin on May 29, 2010, which may be found at <http://online.wsj.com/article/SB10001424052748703957604575273003196960336.htm/?keywords=green+leed>.

16. "Alliance for Environmental Sustainability Residential Pre-Occupancy Case Study," Dec. 17, 2010, <http://www.alliancees.org>.
17. *See*, [www.usgbcnj.org](http://www.usgbcnj.org), New Jersey Chapter of the U.S. Green Building Council website.

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