

## Energy and Water Usage: The New Non-Disclosure Risk?



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When it comes to the certification of commercial green building projects, the LEED rating systems promulgated by the United States Green Building Council (“USGBC”) have cornered the lion’s share of the American market, with several municipalities now mandating that certain size and/or type of projects be designed to achieve specified LEED certification levels. Nonetheless, the LEED rating systems are not without critics, including those who want the bar raised higher and assurances that, once certified, green buildings will not go unmonitored. Seemingly in response, the USGBC has incorporated in LEED 2009 “Minimum Program Requirements” that require ongoing reporting of building energy and water usage.

The Green Building Certification Institute (“GBCI”) which administers LEED certification of commercial projects is also requiring owners to enter into a LEED® Certification Agreement. This requirement is currently being applied to owners who want to register projects under the 2009 LEED Green Building Rating Systems for New Construction and Major Renovations, Core & Shell Development, Schools New Construction and Major Renovations and Commercial Interiors, as well as to owners registering under the Existing Buildings: Operations and Maintenance Rating System. This Certification Agreement requires, in relevant part, that Owners:

- Authorize GBCI and the USGBC to access and review a project’s Energy and Water Usage Data from the utility service provider and/or the whole-project metering facility where such meters are in place, so long as such access is reasonably practicable, for a period of five (5) years following the date the project achieves LEED Certification;
- Authorize such access as stipulated within the project monitoring requirements within the first calendar year after the project achieves LEED Certification;
- Notify all subsequent Owners and/or occupants of the project’s monitoring requirements; and
- Use “reasonable efforts” to require that all subsequent Owners and/or occupants of the project, in part or in whole, comply with the project monitoring requirements.

The penalty for breach of these provisions of the LEED® Certification Agreement is unspecified. However, decertification seems a likely consequence.

Last year, the USGBC was faced with a well-publicized controversy created by a group of Wisconsin residents who challenged the USGBC’s award of LEED Gold certification to Northland Pines High School. The school was completed in Fall 2006 and earned certification as the first LEED Gold high school in May 2007 under former LEED for New Construction Version 2.0/2.1. The challenge to the school’s certification reportedly centered around the efficiency of the HVAC system used and raised the question of whether the USGBC had authority to revoke certification for a project. However, as the school had obtained certification under an earlier version of the LEED rating system, the USGBC was not required to decide the penalty for non-compliance with LEED 2009 “Minimum Program Requirements” (or the GBCI’s LEED® Certification Agreement) in that instance. But the

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USGBC appears well aware that there will be other challenges. In a recent interview, Rick Fedrizzi, President and CEO of the USGBC, reportedly acknowledged that decertification is all but certain under future LEED rating systems.<sup>1</sup>

As the GBCI's LEED Certification Agreement is not a recorded document, prospective buyers may be unaware of continuing energy and water usage reporting obligations. Therefore, failure to disclose these obligations could lead to revocation of LEED certification, thereby materially affecting the value of the property and possibly subjecting the project to penalties under local ordinances that require LEED certification or compliance with comparable standards.

Similarly, all nonresidential properties - whether green buildings or not - will soon be subject to mandatory energy consumption disclosure requirements under California Public Resources Code section 25402.10 (Assembly Bill 1103 passed in 2007, as amended by Assembly Bill 531 (2009) and Senate Bill 1330 (2010)). The California Energy Commission is expected to implement the disclosure requirements in phases which will require the delivery of energy consumption data for the most recent 12-month period to a prospective buyer, lessee of the entire building, or lender that would finance the entire building. In the first phase, effective January 1, 2011, owners of nonresidential property with total floor space of 50,000 square feet or more or solely occupied by the owner with total floor space of 1,000 square feet or more will be required to provide a Statement of Energy Performance and the California Energy Performance Disclosure Report. These disclosure obligations will extend to owners of nonresidential property with total floor space measuring 10,000 to 50,000 square feet on January 1, 2012 and to nonresidential properties with total floor space between 1,000 and 10,000 square feet on July 1, 2012.

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<sup>1</sup> "Green Building Law Update" posted September 29, 2010:  
<http://www.greenbuildinglawupdate.com/2010/09/articles/legal-developments/usgbc-ceo-warns-of-leed-decertification/>