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Green Building Law IN Brief

** providing periodic legal updates on green building, LEED and sustainable building practices in Indiana**

LEED Certification Challenges and Decertification

(July 13, 2010) With huge sums of money being tied to project performance and obtaining a certain LEED rating, whether through tax breaks, bonuses or other financial incentives, I've frequently wondered what would happen if something occurred which caused a project to have its LEED rating downgraded or even revoked. Who is responsible for the risks associated with the financial repercussions which may result from a downgrade or decertification of a project? The following analyzes the LEED Certification Challenge Policy as it was applied to the recent first-of-its-kind third-party appeal of a LEED certification.

In December 2008, a group of local residents in Eagle River, Wisconsin filed a complaint with the U. S. Green Building Council ("USGBC") challenging the award of LEED Gold rating to Northland Pines High School in 2007. The complaint alleged that the project failed to comply with certain LEED certification requirements, including that the school was not outfitted with a properly efficient HVAC system.

Before addressing the results of this appeal, it is important to note the scope and significance of the previously untested appeals process. The following is excerpted from the LEED Policy Manual published by Green Building Certification Institute ("GBCI"), which is the organization responsible for administering the LEED Rating System:

GBCI may revoke previously granted LEED certification or take other action regarding LEED certification such as determine to reduce points or category of LEED certification previously granted, if GBCI determines that credits/prerequisites for LEED certification were granted based on erroneous determinations or inaccurately or falsely submitted documentation. Persons concerned with possible inaccurately granted LEED certification are encouraged to contact the GBCI, provided, however that GBCI reserves the right to institute an investigation and review of such possible errors or inaccuracy or veracity of documentation without third party complaint.

If GBCI determines that the complaint is frivolous or not relevant to credits required for LEED certification, no further action will be taken. Should GBCI determine that the allegation appears credible and the allegation is founded on

the error or inaccuracy of GBCI or veracity of the documentation submitted in support of the credits/prerequisites in question, GBCI shall proceed with its investigation, requesting information from the Project Manager and/or the Owner or others involved in the project.

GBCI's LEED Policy Manual establishes that any person can challenge any LEED minimum requirement or point at any time. Furthermore, currently there is no mechanism for the successful party in a challenge to recover their costs. The lack of barriers to challenge a LEED certification score certainly suggests that future challenges are inevitable. This will increase transaction costs for owners, designers, contractors and other involved parties who now may need to defend such challenges.

So what happened in the Northland Pines matter? In April 2010, USGBC upheld the certification level previously awarded to Northland Pines and stated:

After extensive review, USGBC and its consultants have no reason to believe that the project failed to meet all of the LEED prerequisites and credits that it has attempted. Thus, USGBC will not act to revoke certification or disallow any prerequisites or credits. Northland Pines High School will retain the 40 points awarded to the project in its original review. The project remains certified at the Gold level.

But, the challengers were not yet finished. They appealed the decision by issuing a reply entitled "LEED Credibility Destroyed" which stated in part:

It is obvious that USGBC fails and refuses to acknowledge their inability to enforce and their unwillingness to support their intellectual property or defend their client's property rights. Both independent consultants to the USGBC share the same shame as the designers and contractors who submitted the LEED application to the USGBC for not admitting that this building does not comply with the two prerequisite [HVAC-related standards] in their entirety.

Finally, in June 2010, USGBC offered the following in response:

USGBC stands by its conclusion that the Northland Pines High School project and project team complied with all the requirements necessary to achieve LEED Gold certification. In response to a complaint, USGBC followed its certification challenge policy, which requires a thorough and technically rigorous review of the project. Given the vociferous and confrontational nature of the complaint, we further asked for two additional and separate technical reports detailing the expert professional opinions of highly regarded independent consultants. Their findings agreed with ours.

Anyone who has actually been through a LEED certification review knows that it is a dialogue between the project team and the reviewer. After reviewing the documentation submitted by a project team, the reviewer issues a request for more information in a "Preliminary Review". The project team responds to any

reviewer comments and resubmits. The reviewer then reassesses the project and issues a 'Final Review'.

The process USGBC used to deal with this appeal was similar to our standard process but in addition to having the original submission and reviewing everything we normally review we also had the complaint document. There were issues in the complaint document that were not (from our independent consultant's point of view) adequately addressed by the 2007 submission so we asked for and received additional clarifying documentation from the project team. This additional documentation answered all open questions and made it possible for USGBC and the independent consultants hired to provide their expert technical opinions to conclude that the project does in fact comply with LEED Gold requirements.

LEED's intent, and USGBC's mission, is about helping people learn about and understand how to design, build and operate better buildings. Buildings are complex systems of systems and any of the 100,000 of decisions associated with design, construction and operation can always be second-guessed. We are confident that our due diligence has been more than sufficient to put these issues to rest, and we are moving forward to focus our efforts where they do the most good -- advancing the market uptake of green buildings and communities that is at the heart of our work.

It may be too early to tell the full impact of the Northland Pines challenge and subsequent result, but one can certainly see that the existence and implementation of the LEED Certification Challenge Policy is likely to lead to further challenges and defenses of LEED ratings. Also, it is conceivable that challenges will eventually make their way from the USGBC and GBCI-administered LEED Certification Challenge Policy to the courtrooms in the form of arbitration, mediation and litigation. These challenges will not only increase transaction costs but also increase potential liability for professionals and consultants involved in LEED projects. Consistent with many themes prevalent in LEED regarding the life-cycle approach to building and design, the role of project advisors does not end when the initial LEED rating is awarded. As always, proper allocation of risk needs to be considered when addressing not only the typical functions associated with designing and building a LEED project, but should also extend to post-certification liability.

Project Spotlight

Bank of America Tower (New York, NY):

The 1,200 foot skyscraper became New York's first high-rise commercial building to obtain a LEED Platinum rating. The Bank of America tower achieved such highest designation under the LEED Core & Shell program and included such energy-efficient features as an advanced air filtration system, under-floor ventilation system, worker-specific temperature controls and a water system which captures and re-uses water from both rain and sinks.

Birch Bayh Federal Building and U.S. Courthouse (Indianapolis, IN):

The recently announced \$69.3 million project, funded by the American Recovery and Reinvestment Act, is designed to improve the energy efficiency of the 105-year-old downtown Indianapolis building. The main components of the greening of this building will include the installation of a new fire prevention system, a green roof, digital temperature controls and tanks used for harvesting and re-using rainwater.

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*** Because different fact scenarios may create different legal obligations, this issue of Green Building & Sustainability IN Brief does not constitute legal advice. Please consult an attorney for advice about any specific matter.**