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New Directions

Are the LEED 2009 requirements a tempest in a teapot or a ticking time bomb? BY EDWARD B. GENTILCORE

Recently, the U.S. Green Building Council (USGBC), the major entity responsible for the rapid proliferation of green design and building techniques throughout the United States through its LEED rating system, published a white paper on legal risk. The paper, entitled *The Legal Risk in "Building Green": New Wine in Old Bottles? A USGBC Panel Discussion*, sought to calm the growing populism in the design and construction community who have become increasingly concerned (and in some instances vocal) about the greater risk exposure on green construction projects, particularly those seeking a LEED rating. Even more particularly, concern has focused on instances where those LEED ratings are tied to incentive programs, whether at the federal, state or local level.

Indeed, while in most instances it would be an understatement to say that the USGBC has made a profound and lasting impact on many different segments of the design, building and development trades, it is still crucial to remember several key points. First, despite its ubiquity, "green" building in proper context means achieving requirements or standards of performance that are not altogether as universally understood as the verdigris-hued label being applied to a multitude of initiatives promoted as environmentally responsible or energy efficient. Second, when incentives are tied to achieving goals within the USGBC's Green Building Rating System, there are now palpable and definite consequences if the given building fails to achieve the silver, gold or other LEED rating target, which is being used as a benchmark for receipt of favorable tax incentives or additional zoning allowances. Third, despite its positive message, society-improving goals and diligence in trying to evolve to match critique, criticism and an ever-evolving ecology, the USGBC is neither a governmental entity with democratically elected officials nor is it subject to any governmental or legislative oversight.

Deciphering New Standards

Notwithstanding, and in the face of these concerns, the upshot of the white paper is that any risks associated with green building or the LEED rating process are really much ado about the same somethings that have been around for a long time with non-green-complexioned construction projects. However, even within the dialogue identified in that article, there are references to concerns being voiced by contractors and design professionals alike – namely, whether and to what extent they will bear

liability to an owner who has not achieved the level of LEED rating necessary to obtain a specific rating-based incentive for its project.

The issuance by the USGBC of LEED 2009 – also referred to as LEED v3 – is poised to send significant shockwaves through an industry still attempting to find its footing on the prior iterations of LEED requirements. Although several articles have already been generated on the nuts and bolts or altered mechanics of LEED v3, the more critical and immediate read for those interested in pursuing rating certification under LEED 2009 should be the policy manual issued by the Green Building Certification Institute (GBCI). The GBCI is the entity responsible for administering the LEED certification process and a wholly owned subsidiary of the USGBC.

The policy manual notes for the first time that projects which have succeeded in obtaining the requisite or desired LEED-rating may be decertified and the rating "may be revoked upon [the GBCI] gaining knowledge of non-compliance with any applicable MPR [minimum program requirements]." On the face of the policy manual, this is a dramatic change in the method and manner by which buildings were rated by the USGBC in the past. With the exception of LEED for Existing Buildings (LEED-EB), recertification or certification review was not a part of the rating radar for these projects. Now, owners making the decision of whether or not to pursue a LEED-rated project will have to consider the potential that the achievement of the desired rating may be a Pyrrhic victory because, in the very near future, decertification may be the project's ultimate legacy.

The policy manual establishes a fact gathering mechanism for this potential decertification review in several different ways. Not only does it state that "certified projects must commit to sharing with the USGBC and/or GBCI all available actual whole-project energy and water usage data for a period of at least five years," under the whole-building project monitoring policy section, the policy manual provides: "Project owners authorize GBCI to access and review their 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. This authori-

zation shall be maintained for a period of 20 years following the date the project achieves LEED certification ... It is the burden of the project owner to ensure that all subsequent owners and/or occupants of the project in part or in whole are notified of and comply with this requirement. Access must be authorized within the first calendar year after a project achieves LEED certification." Whatever the underlying rationale for collecting this data, the USGBC and the GBCI are placing themselves in a position to gather information from the owner that could very well be used to thwart or undo the owner's desire to have its building certified by the USGBC and the GBCI and remain certified. This approach also creates a difficult policing obligation of landlords vis-à-vis their tenants or landowners, and developers vis-à-vis subsequent purchasers.

If the above scenario was not enough to cause an owner to reflect further before seeking a green building rating under LEED v3, there is also an extensive procedure whereby certification can be challenged by nonparties to the project. The policy manual observes: "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."

These procedures place in the hands of the GBCI a great deal of power to impact a project that may have already begun to enjoy the benefits of an incentive program tied to achievement of a given LEED rating. The accuser upon which the GBCI bases its revocation determination could be a disgruntled project participant who has not been adequately compensated in its own view or perhaps a developer who wants to compromise a competitor's green portfolio. While the procedures do accommodate review by an appeals board in the event of

an unfortunate determination against the heretofore LEED-certified project, the policy manual goes on to provide: "The appeals board will determine all matters related to the hearing. Formal rules of evidence shall not apply. Relevant evidence may be admitted. Disputed questions will be determined by the appeals board."

A criticism that could be leveled readily on the entirety of these procedures is that they do not afford the owner true due process for the loss of potentially significant incentives that the project is enjoying by virtue of obtaining the LEED certification through the system established by the USGBC. Two examples come to mind. In the first instance, if the owner has done that which the USGBC requires in order to obtain certification and the USGBC has inadequately policed its own certification procedures, then the owner should not be in a position to suffer due to complaints raised about the process after the fact. In the second scenario, assuming the USGBC has taken action to decertify a project based on a nonparty's "whistle blowing," the identity of that nonparty should be disclosed to the decertified project's owner at a time when there can be a more meaningful opportunity to confront one's accuser and possibly expose the agenda behind that accuser's complaints.

New Provisions

There is another provision of the new policy manual that allows a licensed professional to alternatively provide verification for a number of submittals required for LEED certification simply by providing that licensed professional's information as well as a representation that the project is compliant with LEED requirements. Although the policy manual states that the licensed professional must self-police the representations or bear the risk of having their licensing authority notified of their professional indiscretion, the concern to the project, the owner and any contractor relying on those representations is much more immediate because it is their interests that will be cast into the same tumultuous sea of uncertainty if a challenge is raised to the project certification due to an inadequate design never submitted to the USGBC in any detail whatsoever in the first place. Stated another way, with the detail of the submittal being supplanted by the licensed professional's representation, will the contractor be placed in a more vulnerable position of being held accountable due to what really is more of a design-based error or omission?

Other commentators have already opined on an MPR-by-MPR basis as to the mechanics of the new LEED rating system. Beyond any such critique, there are greater concerns stemming from this policy manual, to which project participants seeking rating certification must adhere. With decertification easily on the horizon of any particular project in the event that the originally green elements are not zealously maintained, there also is the possibility that designers and contractors will face liability claims by the owners who have received a decertification notice from the USGBC and/or GBCI between five and 20 years after the project's original recognition as a LEED-certified structure. The potential for such open-ended liability and the added uncertainty to any owner desiring to obtain a LEED rating recognition may ultimately point owners and developers away from the LEED rating program. As such, the "improvements" of LEED 2009 may end up doing more harm than providing actual life-sustaining enhancements to the LEED program. ♦



Edward B. Gentilcore is a partner in the Pittsburgh office of Duane Morris LLP, and serves as vice chair of Duane Morris' construction group. He practices in the areas of construction law and complex commercial litigation with a considerable emphasis on construction litigation, construction contracts, green building and mechanic's lien matters. He is a LEED-AP under the U.S. Green Building Council's Green Building Rating System. He can be reached at ebgentilcore@duanemorris.com.