

Building Energy Performance Litigation

Are More Suits like *Gifford v. USGBC* on the Horizon?

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As seen in the October issue of *DRI Today*.

Does LEED-certification necessarily correlate to building energy savings? That is the crux of a lawsuit filed by Henry Gifford (along with an architect, engineer, and consultant) against the United States Green Building Council (USGBC), currently pending in the Southern District of New York (Case No. 1:10-CV-07747). If Mr. Gifford can show that LEED over-promised and under-performed in relation to energy savings, do designers, builders, and sellers in the green industry run the risk of liability for engaging in false advertising, deceptive practices, or other similar allegations? While the world waits to see how the *Gifford* suit unfolds, these same designers, builders, and sellers should evaluate the actual energy use of their properties beyond deferring to building certification labels or ratings. Much remains unknown about the actual economic benefits of green buildings. If the green information gap is not addressed sooner rather than later, more suits like *Gifford* may follow.

Mr. Gifford's lawsuit, originally filed as a class action, was amended in February 2011 to include claims of false advertising, deceptive practices, and illegal monopolization. Gifford's primary complaint is that LEED misrepresents the energy performance of its buildings by skewing study results. Support for this contention rests on Gifford's analysis of a 2008 New Buildings Institute (NBI) study comparing predicted energy use in LEED-certified buildings with actual energy use. In the study, NBI concluded that LEED buildings are 25-30% more energy-efficient compared to the national average. To the contrary, Gifford argues that LEED-certified buildings actually use 29% more energy than the national average. He further emphasizes that the NBI results are misleading in that the NBI study compares the median energy use of LEED buildings to the mean energy use of non-LEED buildings.

USGBC responded in April with a motion to dismiss the suit, arguing that the plaintiffs lack standing and cannot prove that they were harmed by the allegedly illegal conduct. A decision from the court on USGBC's motion to dismiss is expected in the next few months.

Whether Gifford and the other plaintiffs can prove that they were among the folks deceived by USGBC's building performance claims is an analysis for another day. Gifford's suit prompts a broader discussion on the absence of sufficient, objective data to accurately compare the energy use and costs of buildings relative to their peers. Indeed, Gifford seeks an injunction to compel USGBC to disclose the actual energy use of LEED properties in the form of utility bills (and for those utility bills to be uploaded onto an online database accessible to the public). Such a prayer for relief suggests that Gifford is less concerned about obtaining money damages and more interested in transparency in the green building industry.

Truth be told, USGBC may not be able to give Gifford this data – even if it wanted to. There are obviously privacy issues, among others, when discussing the retrieval and publication of LEED-certified building owners' utility bills. And to be fair to USGBC, they should not be held responsible for LEED building owners' inefficient use of property after the initial certification process is completed.

But privacy issues aside, what if the public could perform an apples-to-apples comparison of the actual energy used by a LEED building compared to a non-LEED building? Certainly it is not difficult to imagine the potential legal ramifications should Gifford's theory prevail – that LEED buildings use more energy than advertised. Building owners can pay a steep price for LEED certification. If the impetus behind LEED-certification was energy savings, and a LEED building is not performing energy-wise consistent with what was contracted for or, even worse, is being out-performed by non-LEED buildings, commercial designers, builders and sellers alike could face liability.

Thus, the *Gifford* suit presents a scary predicament for the green industry. Green construction has remained popular even in the midst of a construction recession. Some buyers are willing to pay more for a building with high energy efficiency performance – perhaps attracted by the pure environmental benefits, the promise of increased marketability down the road, or both. Therefore, it would be foolish to ignore the growing demand for energy efficient buildings. But with LEED's admitted shortcomings in terms of measuring actual energy performance and the fact that the CBECS database (which comprises the peer-to-peer data for which the EPA Energy Star scoring is dependent on) is over 8 years old, the commercial building industry must be wary of making unintentionally misleading representations about a building's energy performance levels.

Nowhere is the risk of making misleading representations about a building's energy efficiency more evident than in the context of a real estate transaction. In the past few years, several states and local governments have passed mandatory building energy labeling and transaction disclosure regulations. These energy disclosure mandates, in conjunction with certain building codes requiring specific energy-efficiency improvements, triggered the development of a standardized methodology to assess and

report on a commercial building's energy use.

In February 2011, ASTM formally published its Building Energy Performance Assessment Standard – E 2797-11 ("BEPA"). Its purpose was to enable users to measure the energy performance of a commercial building in connection with a real estate transaction. ASTM is not creating or implying the existence of a legal obligation for the reporting of energy performance or other building-related information. Instead, ASTM's BEPA offers guidelines to the industry to promote consistency when collecting (and possibly reporting) building energy usage data, such as:

- Collecting building characteristic data (i.e., gross floor area, monthly occupancy, occupancy hours);
- Collecting a building's energy use over the previous 3 years (with a minimum of 1 year) – including weather data representative of the area where the building is located;
- Analyzing variables to determine what constitutes the average, upper limit, and lower limit of a building's energy use and cost conditions;
- Determining pro forma building energy use and cost; and
- Communicating a building's energy use and cost information in a report.

Building benchmarking (i.e., comparing a building's energy output to its peers) is not part of the ASTM BEPA standard's primary scope of work; however, it can be used in conjunction with building certification tools already present in the marketplace – like USGBC's LEED.

ASTM's BEPA promotes transparency. When responding to inquiries about a building's energy-efficiency in the context of a real estate transaction, BEPA users can show the potential buyer not only the actual utility data but how the data was collected and calculated. And while the BEPA can also reveal a building's projected energy use and costs into the future, the assessment details the variables and acknowledges the limitations associated with that calculation. Which is why this author has previously suggested that the BEPA may function as a safe harbor protection for sellers, especially in states with mandatory energy consumption disclosure laws. Even in states where no such laws are on the books, sophisticated buyers can insert energy performance clauses directly into the purchase agreement. The BEPA permits sellers to communicate the building's energy performance usage beyond a certification score or rating, which may offer some protection down the road against a litigious buyer or investor unsatisfied with the energy output of the building.

It is this level of transparency that is lacking for Mr. Gifford. His lawsuit boils down to a criticism of the data used by USGBC to show that LEED buildings are more efficient

than the national average. Gifford seeks to perform discovery "into the question whether USGBC's ads are truthful, whether LEED-rated buildings actually use less energy than conventionally-built buildings." (Resp. to Pltff's Mot to Dismiss, at 9). Whether USGBC opens its records for inspection remains to be seen. In the interim, designers, builders and sellers alike should be wary of extolling the economic virtues of green building without at least some investigation into the actual energy performance of their buildings.

In sum, it is the absence of robust energy usage data for measuring the economic benefits of green buildings that may trigger more lawsuits like *Gifford* in the future. Green building practices can and should continue. But the flaws in LEED, EPA Energy Star, and other building certification tools should encourage the industry to do their own due diligence in terms of evaluating building energy efficiency before promoting energy savings in the marketplace. Crossing your fingers does not count.