by Peyton White Lumpkin and Deborah Bovarnick Mastin

The Latest in Green Development: Advising Your Client on the New Standard for Real Estate Projects

Green strategies promise to reduce developments' impact on the environment and provide health and productivity benefits, all while saving money. But how can you and your clients distinguish green marketing claims about the construction and operation of a real estate development from greenwashing? This article provides an overview of green legal issues that affect the planning, financing, design, construction, operations, and leasing of projects, including green building rating systems, incentives for green projects, and drafting concerns in construction, leasing, and loan documents. You will understand how green can be verified and measured, and concerns arising from common real estate transactional documents.

Green Building Rating Systems

Competing nonprofit organizations have developed a variety of green building rating systems. These systems aim to measure the climate-friendly performance of various components of construction and operation of buildings, particularly increased energy efficiencies.

• *LEED* — The preeminent green building rating system is LEED, an acronym for Leadership in Energy and Environmental Design, which is a voluntary, nationally recognized third-party certification system for green building projects created and maintained by the U.S. Green Building Council (USGBC).[1] To receive LEED certification, a developer submits its project for review to the Green Building Certification Institute (GBCI), the organization that administers project certification under the LEED rating system. The USGBC has no connection to any governmental agency. However, its prestige is such that LEED has been adopted as a minimum standard of sustainability by numerous governmental entities that regulate land use and development within Florida and across the nation. The USGBC first introduced a LEED pilot program in 1998 and launched its most recent version, LEED 3.0,[2] in April 2009.

LEED certifications are not just for new construction projects. The USGBC rates and certifies a wide variety of development projects. It currently offers rating systems for certification in the categories of new construction and major renovations, existing buildings, operations and maintenance, commercial interiors, core and shell, schools, retail, healthcare, homes, and neighborhood development.[3]

LEED uses a point system providing credit for meeting prescribed green building requirements. A project can achieve one of four levels of certification, depending on how many points it has documented. For example, with LEED 3.0 for new construction, core and shell, and schools, a project earns a rating of "LEED Certified" with 40 to 49 points, "LEED Silver" for 50 to 59 points, "LEED Gold" for 60 to 79 points, and "LEED Platinum" for 80 points or more. The descriptions of the available points are found on the USGBC website.[4]

LEED points can be earned in six categories of sustainability: sustainable sites, water efficiency, energy and atmosphere, materials and resources, environmental quality, and innovation in design. For example, a project can earn points in the sustainable sites category if it is located on land that has previously been developed (as opposed to a pristine site in its natural condition); a project can earn points in the materials and resources category by incorporating significant amounts of "renewable" materials (those requiring fewer than 10 years to grow and harvest), such as bamboo, cork, and straw. LEED 3.0 offers special points for projects that effectively address issues of regional concern in Florida and in other selected locations with atypical climate conditions.[5] A project is evaluated after completion based upon documentation submitted.

Not only does the USGBC provide rating systems for projects, it also provides for accreditation of people through the GBCI.[6] You've probably noticed a number of lawyers, architects, engineers, and other design professionals who now include "LEED AP" after their names. A LEED accredited professional has passed an examination geared to demonstrate a level of knowledge regarding environmentally sustainable practices in building design, operation, and management. The credential was first offered in 2001, and specialties were added in 2009.

LEED certification of a project increases both the general complexity and the need for teamwork and advance planning. All project team members — including the owner, designer, constructor, and major subcontractors — have different but integrated responsibilities for achieving the desired level of certification, and their respective contributions need to be coordinated in order to meet criteria for LEED certification. The presence of a LEED AP on the project team provides assurance that at least one person understands these interlocking relationships and

also earns the project a point.

Effective July 1, 2008, all Florida "county, municipal, school district, water management district, state university, community college, and Florida state court buildings" are required to be constructed to meet either LEED, the Green Building Initiative's Green Globes rating system, the Florida Green Building Coalition standards, or other nationally recognized green building rating system.[7] The State of Florida has also instituted new requirements for greenhouse gas reduction and energy conservation strategies in local comprehensive plans.[8]

Local governments have increasingly established LEED requirements for buildings they own, lease, or finance. For example, Miami-Dade County requires that all new county buildings achieve a minimum of LEED silver.[9] The City of Miami's zoning code, "Miami 21"[10] requires that all new private buildings of more than 50,000 square feet in specified zones achieve at least LEED Silver certification or equivalent standards approved by the city and further requires that the owner post a performance bond[11] to assure certification.

• *Other Green Rating Systems* — Although LEED is the preeminent green building rating system, there are several others that are frequently used in Florida, including those developed by the Florida Green Building Coalition, Green Globes, and Energy Star.

The Florida Green Building Coalition (FGBC) is a nonprofit Florida corporation dedicated to improving the "built environment" by providing statewide standards to be verified by an independent organization. The FGBC has five certification programs for new development projects: Green Home Standard, Green Development Standard, Hi-Rise Residential Standard (residential buildings over three stories), Green Local Government Standard, and Green Commercial Building Standard (commercial buildings of 30,000 square feet or less).[12] FGBC also uses a point system for a green designation. It encourages municipalities to provide development incentives for those meeting its standards and promotes its marketing value as an alternative to standardless "greenwashing." Some elements that distinguish this system from LEED are lower cost, ease of use, and attention to Florida's specific climate and weather challenges. The FGBC addresses durability issues presented by hurricanes, floods, sun, moisture, and termites through material selection and is consistent with Florida's more stringent energy and stormwater codes.

The Green Globes assessment program is used in the United States and Canada and offers certification for both new construction (United States only) and operation of commercial buildings projects. Based on a 1,000-point scale, this rating system examines seven categories of environmental impacts: energy, indoor environment, site, water, resources, emissions, and project/environmental management.[13] The program is operated in the United States by the Green Building Initiative (GBI)[14] and in Canada by the Building Owners and Managers Association as BOMA BeSt.[15]

Energy Star[16] is a joint program of the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Energy (DOE) that promotes energy efficient products and practices with the goal of saving money and decreasing environmental impact. The program awards an Energy Star to new products such as office equipment, light bulbs, and appliances which meet strict EPA/DOE energy efficiency guidelines. It also offers the Energy Star to new homes that meet specified criteria and to top-scoring businesses in its energy performance rating system.

Incentives for Green Projects

The list of incentives for verified green projects is significant and growing. These incentives include, among others, expedited permitting, enhanced marketing appeal, increased operating efficiencies, grants, awards, and tax benefits.[17]

One common incentive provided by local governments for projects meeting designated environmental sustainability criteria is expedited permitting. For example, both Miami-Dade County and the City of Miami offer expedited permitting for green buildings, relying on the evaluation, registration, or certification of the design by recognized environmental rating agencies such as

the FGBC and the USGBC.[18]

Local governments encourage green development by providing financial incentives for green projects. Miami-Dade County's Targeted Jobs Incentive Fund Program[19] provides monetary incentives for job creation, including to an employer operating in a building certified through LEED or the FGBC. The program gives an additional monetary bonus if the building incorporates solar, thermal, photovoltaic, fuel cell, or cogenerating energy generation hooked up to the local grid. Miami-Dade County also allows "all rapid transit development having been designed and having registered for a certification rating from LEED or a similar organization accredited by USGBC" an increase in the number of allowable stories.[20]

The federal government also offers incentives for energy efficiency and renewable technology,[21] including a corporate tax credit[22] for solar equipment used to generate electricity or illuminate with fiber-optic distributed sunlight, geothermal equipment, qualified fuel cells or microturbines, combined heat and power system equipment, small wind energy equipment, and thermal energy equipment. The Internal Revenue Code also offers a tax credit of up to $1.80 per square foot to owners or designers of energy efficient commercial buildings.[23] To qualify for the credit, the interior lighting systems, heating, cooling, ventilation, hot water systems, and building envelope of a building placed into service between January 1, 2006, through December 31, 2013, must reduce the total annual energy and power costs of the building by 50 percent in the aggregate compared to a "reference building." Partial deductions are also available.

Green building certification adds marketing appeal to increasingly environmentally conscious tenants and consumers. Part of the promise of green buildings is the potential return on investment driven by higher employee productivity and reduced operating expenses. Green commercial developments aim for above-market rents, better tenant retention, higher occupancy rates, and lower operating expenses, yet some of these goals are difficult to verify. Although it is relatively easy to quantify energy savings through comparative assessments,[24] it is harder to measure enhanced workforce productivity and health. LEED 3.0 requires tenant interviews,[25] but this data is subjective. A Michigan State University study[26] has taken a preliminary step toward providing scientific evidence on the health and productivity benefits of green construction and operations, but significant work remains to be done.

Drafting Considerations in Construction Documents, Loan Documents, and Commercial Leases

So how does one obtain a project that is sustainable, conserves energy and water, minimizes its carbon footprint, provides clean air and water, brings bonuses and incentives, and generally supports the environment? There is little guidance to be found in standard contract forms for the drafters of such transactions. *Southern Builders, Inc. v. Shaw Development, LLC*, Circuit Court of Somerset County, Maryland, Case number 19-C-07-011405 (2007), is instructive. The plaintiff contractor sued to foreclose on a construction lien. The defendant developer filed a counterclaim seeking over $600,000 in lost tax credits, alleging that the plaintiff breached its contract by failing to construct a building that met LEED Silver Certification. At issue was whether the contractor was obligated to do so, when the only mention of LEED or sustainability in the contract was a single sentence that stated: "Project is designed to comply with a Silver Certification Level according to the U.S. Green Building Council's Leadership in Energy and Environmental Design ('LEED') rating system…."[27] The parties ultimately settled, but the cautionary lesson is to draft precise contract language designating specific responsibilities for achieving the project's LEED objectives.

Rescuing a project after it has failed to qualify for a third-party green rating is costly and inefficient. Careful advance planning is crucial to maximize the chances of meeting targeted green goals. Each separate contract that affects the project development effort, including the loan agreement, contract for design services, contract for construction management or construction services, the "downstream" subcontracts, and the contract for property management services, needs to spell out the steps that each party is expected to take in order to deliver and maintain a LEED-qualifying project. The certification requirements must be specified correctly and consistently in each of these documents as along with the specific responsibilities of each party in achieving those requirements.

The responsibility is not solely the designer's. LEED offers points for purchasing local materials because of the reduced carbon footprint of lesser transportation requirements; consequently, the parties need to be aware of which materials can be obtained locally. LEED also offers points for recycling construction waste, so that opportunities for recycling materials need to be evaluated and identified. These choices have traditionally fallen within the purview of the project's constructor, not its designer. In order to obtain the constructor's commitment to utilize these opportunities, the construction contract needs to identify the specific obligations that the constructor will be expected to undertake.

The need for external certification of green projects has also created the need to document and catalogue compliance efforts on an ongoing basis from site development through completion to enable subsequent verification by the certifying body. The GBCI does not visit a project when it grants certification; rather, it evaluates the documentation submitted after project completion to support the certification application. Assembly of the necessary documentation is almost impossible after a project is finished. If the work was done appropriately but there is no documented verification to demonstrate compliance, credit will not be granted. Adequate recordkeeping is critical for achieving LEED certification.

The attorneys representing the parties can offer valuable assistance by helping their clients clarify their expectations so that the final design contract represents a true meeting of the minds. Unstated assumptions on either side will create future conflict that could have been minimized or avoided. Is there a minimum degree of energy efficiency that the owner anticipates realizing when the project is operational? Is the owner willing to invest in the

installation of emerging technology in order to reduce operational expenses? Is the owner sufficiently knowledgeable to make these decisions, or is one of the designer's responsibilities to educate the owner by bringing options to the owner for evaluation? Contract language that merely calls for a "green" or "sustainable" project is too vague and generic to be useful.

Even though the USGBC and other green certification entities are private, nonprofit corporations, certification under one of these programs has rapidly become almost as essential to the success of a project as meeting the requirements of the local building code. Compliance with the green requirements may soon become the standard of care used by similar professionals in this community.

In response to the demand from the design and construction industries, the American Institute of Architects and the Association of General Contractors now offer "green addenda" to their respective families of standardized form documents. These documents modify the basic contracts to shape the structure of the project team, contemplating that it be supervised on green matters by a designated green coordinator. The green coordinator could be the owner, a specialized consultant engaged by the owner, the designer, a subconsultant to the designer, the general contractor, or one of its subcontractors. The addenda also assign responsibilities for achieving a green project to specific team members, with the specific scope of services to be articulated within the contract documents. The ultimate value of these and similar forms will lie in the details supplied by the project participants.

To be effective, the "green" provisions need to address sustainability issues at all phases of construction, including commissioning specifications of the project's equipment and systems. To achieve the operational objectives of energy savings, cleaner air, or cleaner water, the maintenance staff who will be managing the facility's operations during its occupancy must be instructed in the proper use of innovative technology and the optimal use of building management systems. Consequences for noncompliance with specified green measures should be coordinated with any conditions imposed by loan or lease documents, so that the entire development structure is consistent and integrated.

Because a lender needs to assess potential risks to the success of its borrowers, a lender's due diligence should include inquiries as to how the borrower has addressed the contractual issues discussed here, in order to satisfy itself that the expected income stream from anticipated project revenues is not jeopardized. A prudent lender's entire team will be well versed on green issues, and its inspecting engineer will have the expertise to monitor ongoing compliance with LEED requirements. When appropriate, the loan documents should include covenants and consequences for noncompliance, addressing the green commitments found in the documents on which the underwriting for the loan was based.

Although a number of model green commercial leases have been developed, these form leases generally address a situation where both landlord and tenant are committed to high levels of best practices in the build-out, operation, and management of high performance buildings. More common in current everyday practice is the proposal of "green" provisions for inclusion in a nongreen lease either by the landlord or the tenant, each with attendant ramifications for cost, timing, insurance implications, and other risk allocations. The environmentally sustainable procedures for each individual building are technical in nature. If definitive measurement of compliance is desired, those green standards should be technically specified in the lease. It is more useful in this kind of situation to draft toward specific issues than to rely upon stock "green" provisions.

In 2009, the USGBC instituted ongoing monitoring and reporting requirements during the operational phase of a project as a condition of maintaining LEED certification.[28] This policy change places a responsibility upon the building's operator to use sustainable practices in the maintenance of the building and its mechanical systems. Owners, tenants, and build-

ing managers will likely attempt to secure commitments from their contractual partners and minimize their own responsibilities with regard to guarantees of maintaining a particular level of LEED certification or a level of savings or efficiency in operational cost or energy usage. An owner may want to disclaim, and a tenant may want to impose, implied warranties related to green operations or benefits. The lease should detail consequences in the event the anticipated benefit is not realized or the building becomes decertified. Potential consequences could include rent abatement or other identified concessions, as well as liquidated damages or termination. LEED certification requires that all certified projects must share actual whole-project energy and water usage data with the USGBC or the GBCI for at least five years. The commitment must be honored even if the building changes ownership or the lessee changes, or certification may be revoked. The responsibility for assuring compliance should be negotiated and addressed in the lease.

The owner should avoid inconsistent or conflicting provisions in multiple leases regarding the green requirements of the building, particularly with regard to tenant build-out options and operational obligations. The leases should address specific desired green practices, including applicable LEED requirements, as well as compliance with local green ordinances. Provisions related to insurance, casualty, and business interruption need to take into consideration the unique costs, timing, and procedures related to replacement of a LEED-certified or otherwise environmentally upgraded building and its components.

A number of model green commercial leases and guides have been developed. These include the U.S. "model green lease,"[29] which comes with a reference guide for the model green lease. Both the lease and guide offer strategies to address the central financial issue for implementing green strategies under the standard (nongreen) commercial lease, the fact that the landlord generally pays for green sustainable capital improvements, but the tenant reaps the benefits through savings in reduced operating expenses, such as utilities and cleaning bills. As an alternative, the initial capital investment cost is amortized over an extended period and treated as part of the other operating costs usually passed on as additional rent to the tenant. The model lease deals with green operational issues that affect energy consumption, indoor air quality, recycling services, cleaning, carbon credits, and tenant build-out and includes useful green exhibits, such as a work letter for tenant build-out, regulations, and green cleaning specifications. It is designed to work with or without a rating system.

In 2008, the Building Owners and Managers Association (BOMA) International published *BOMA's Lease Guide: Guide to Writing a Commercial Real Estate Lease, Including Green Lease Language*, a green version of its standard lease guide first published in 2005. The guide recognizes that tenants' occupational patterns comprise an integral component of the operation of a building. A major conceptual advance in the 2005 lease guide was a restructuring of incentives so that landlords can pass on some of the capital costs for green upgrades that will result in lower operating costs. The 2008 green version expands this and includes the costs of operating the building in accordance with green certification requirements, including costs of commissioning and recommissioning. Tenants are given incentives to save energy and are required to comply with the building's green protocols. The guide provides a heavily annotated lease template, which describes obligations legally and serves as a way to educate brokers and the parties regarding those obligations. In order to enhance flexibility, it does not follow any particular rating system, but contains references and notes related to systems including LEED, Green Globe, and EPA Energy Star.

The *2009 LEED Reference Guide for Green Building Design and Construction* published by the USGBC includes tenant-related modules and credits for core and shell. The rationale is that when a building is being designed and constructed for an owner, that owner has much more influence over interior build-out. The guide provides that when the owner will occupy 50 percent or less of the leasable square footage, the project can pursue certification under LEED for core and shell; for over 50 percent, LEED for new construction is the appropriate rating system. Projects can earn extra points by making certain technical requirements binding under a lease or purchase agreement. The guide's core and shell appendix, "Tenant Lease or Sales Agreement," describes applicable credits and requirements for technical specificity in the binding lease or purchase agreement, such as "watts per square foot" and "plumbing fixture flow rates." The credits uniquely available for core and shell also may provide guidance for leases. For example, SS Credit 9 requires the developer to provide an illustrated guide to the tenant with build-out-related information regarding the project's sustainability goals and expectations for tenants, LEED for commercial interiors, and coordination of tenant/building systems. One of the credit's goals is to "help tenants design and build sustainable interiors and adopt green building practices."

In 2009, the USGBC published *Green Office Guide: Integrating LEED Into Your Leasing Process*. Designed for office tenants, the guide is also useful for developers and landlords, and the concepts can be applied to other types of property. The guide addresses reasons for greening the process of leasing, how to accomplish that goal, and tools for implementing the process. It encourages energy-saving strategies, such as lease renewal rather than moving, and long-term leases rather than short-term leases. It emphasizes the importance of using brokers, attorneys, consultants, and other professionals who are experienced with LEED and sustainable practices and provides guidance in how to approach landlords about greener leases. Repeated themes include advance planning with appropriate goal setting, integration, teamwork, and expertise with LEED. Particular emphasis is given to issues regarding LEED certification for commercial interiors. The last section provides concrete tools, such as a basic environmental impact questionnaire for preliminary comparison of green aspects of candidate buildings, and suggested criteria for evaluating potential project team professionals.

Sample lease provisions are included, along with a sample purchasing policy that takes LEED requirements into consideration.

These model lease templates and leasing guides offer a starting point and thorough grounding for negotiating commercial lease transactions. These issues provide a framework for discussions to result in a clearer definition of the responsibilities and obligations of both parties.

Conclusion

Green project development and property management are here to stay. These practices demand new skills for their implementation as development, design, construction, and leasing disciplines become infused with concepts previously more commonly associated with environmental science. These green concerns will affect, if not transform, the way business is conducted in real estate projects, from choice of site, selection of raw materials and their processing techniques, fabrication of products, methods of on-site construction and building components, transportation of product components, and commissioning, through the ongoing maintenance and replacement of project components during the lifespan of the project. As practitioners, we need to develop legal and technical competency regarding these changes to help our clients achieve their objectives. ❑

[1] *See* U.S. Green Building Council (hereinafter USGBC), What is LEED?, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988.

[2] *See* USGBC, LEED Version 3, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1970.

[3] *See* USGBC, LEED Rating Systems, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222.

[4] *See* USGBC, http://www.usgbc.org.

[5] *See* USGBC, LEED 2009: Technical Advancements to the LEED Rating System, Regionalization, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1971.

[6] *See* USGBC, LEED Professional Credentials, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1815.

[7] FLA. STAT. §255.2575(2).

[8] FLA. STAT. §163.3177.

[9] *See* Code, Miami-Dade County Florida §9-75 (2009).

[10] *See* Miami 21, Final Code: May 2010, http://www.miami21.org/final_code_AsAdoptedMay2010.asp.

[11] *See* Miami 21, §3.13.1(b).

[12] *See* Florida Green Building Coalition, http://floridagreenbuilding.org.

[13] *See* Green Building Initiative, Green Globes, http://www.thegbi.org/green-globes-tools.

[14] *See* Green Building Initiative, http://www.thegbi.org.

[15] *See* BOMA BeSt, http://www.bomabest.com.

[16] *See* Energy Star, http://www.energystar.gov.

[17] Florida Green Building Law, Green Building Incentives, http://floridagreenbuildinglaw.com/green-building-incentives-2/.

[18] Code, Miami-Dade County Fla. §8-6 (2009). The City of Miami also offers expedited plans review for buildings registered with LEED. Code, Miami, Fla. §10-4(b)(4)g (2009).

[19] Code, Miami-Dade County, Florida §2-1258 (2009).

[20] Fixed-Guideway Rapid Transit System – Development Zone, Code, Miami-Dade County Fla. §33C-8 (C)(5)(c)(2010).

[21] *See* Energy Star, 2011Federal Tax Credits for Consumer Energy Efficiency, http://www.energystar.gov/index.cfm?c=tax_credits.tx_index, for a comprehensive list.

[22] *See* 26 U.S.C.A. §48.

[23] *See* 26 U.S.C.A. §179(D).

[24] *See*, *e.g.*, Energy Star, Top 25 Cities With the Most Energy Star Qualified Buildings in 2008, http://www.energystar.gov/ia/business/downloads/2008_Top_25_cities_chart.pdf (chart listing energy savings in Energy Star rated buildings).

[25] *See* USGBC, *LEED Indoor Environmental Quality Credit 7.2, Thermal Comfort; Verification*, LEED REFERENCE GUIDE FOR GREEN BUILDING DESIGN AND CONSTRUCTION (2009).

[26] *See* A. Singh, M. Syal, S. Grady, and S. Korkmaz, *Effects of Green Buildings on Employee Health and Productivity* (abstract), AM. J. PUBLIC HEALTH, *available at* http://ajph.aphapublications.org/cgi/content/abstract/AJPH.2009.180687v1.

[27] *Southern Builders, Inc. v. Shaw Dev., LLC*, No. 19-C-07-011405 (MD Cir. Ct. 2007).

[28] *See* USGBC, LEED 2009 Minimum Program Requirements, http://www.usgbc.org/ShowFile.aspx?DocumentID=6715.

[29] Alan Whitson, Model Green Lease, http://www.squarefootage.net.

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