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New Hotel Projects May Have No Choice But to Go Green



Daniel Brown

By Dan Brown, Partner, Sheppard Mullin Richter & Hampton LLP and Jonathan Moss, Associate, Sheppard Mullin Richter & Hampton LLP

LEED Certification

During the 1990's, developers first began to consider environmental impact as though it were a design or building specification, just like other specifications associated with a new project. The most prominent organization to advance green building standards is the U.S. Green Building Council ("USGBC"), a Washington D.C.-based non-profit

entity, which since 1993 has touted a ratings system certifying the environmental sustainability of construction projects. The USGBC's rating system, known as Leadership in Energy and Environmental Design ("LEED") awards points or "credits" to projects that include green design specifications. The LEED system is broken down into discrete ratable categories, such as: Sustainable Site; Water Efficiency; Energy & Atmosphere; Materials & Resource; and Indoor Environmental Quality. LEED certification is achieved based upon a review conducted by a LEED Accredited Professional ("LEED AP"). The LEED AP awards points based upon the particular features of the property. For example, a solar paneled roof could earn a property high marks in the Energy & Atmosphere Category. Once a property achieves a threshold number of points it receives basic LEED certification. Higher levels of LEED certification (LEED Silver, LEED Gold, LEED Platinum) are available depending upon the number of green points awarded.

LEED Certification as a Marketing Tool

Until recently, the LEED certification process was voluntarily and typically employed by hotel brands seeking to attract environmentally conscious hotel guests. For example, in late 2006, hotel impresario Barry Sternlicht billed Starwood Capital Group's launch of "1" Hotel and Residence, as the "first luxury, eco-friendly global hotel brand", which is "committed to protecting and preserving the 'green.'" In late 2008, Sternlicht's former company, Starwood Hotels and Resorts, announced its own eco- hotel brand- element Hotels- to cater to the environmentally conscious crowd. For element, LEED certification is a branding tool. The element Hotels website boasts that "element has made a brand-wide commitment for all element hotels to pursue the U.S. Green

Building Councils (USGBC) LEED certification."¹ LEED-centric marketing is not exclusive to big-name hotel brands. The 77-guest room Ambrose Hotel in Santa Monica, California made headlines by becoming the first existing hotel to receive LEED certification, and the Proximity Hotel in Greensboro, North Carolina was the first hotel property to receive a Platinum rating, the highest level of LEED certification. The Proximity's rooftop includes an impressive 100 solar panels that heat the water throughout the hotel, and boasts that its green features allow it to use 40% less energy and 30% less water than a comparable property.

Mandatory LEED Certification

While hotel developers have recognized the social, cost-saving, and marketing benefits of going green, and have done so in order to, among other things, preserve the environment, increase revenues, and reduce costs, they now have an additional reason to seek LEED certification. LEED compliance is becoming mandatory, as cities around the country have introduced LEED into their building codes. A number of cities require public construction projects to be LEED certifiable- Dallas, Chicago, Atlanta, New York, Oakland, and Austin, among others. Other states and cities offer incentives for private development projects that include green features. For example, Arlington County, Virginia grants a density bonus for LEED certified buildings that permits an increased floor-area-ratio for those projects. New Mexico and Maryland each offer tax credit incentives for projects that are LEED certified. However, the most significant development for Hoteliers is that certain municipalities have implemented mandatory LEED compliance not just for public construction projects but for private projects as well. Developers who build hotels in these municipalities will have no choice but to comply with LEED standards.

The list is quickly growing. Washington, D.C. passed the aptly-named "Green Building Act of 2006" which regulates new construction projects as well as the "substantial improvement" of non-residential privately-owned construction in excess of 50,000 square feet. Following a ramp-up period, all qualifying projects in Washington, D.C. will have to obtain the minimum level of LEED certification.² Likewise, Boston now requires that all new buildings over 50,000 square feet and all substantial rehabilitation projects of buildings over 100,000 square feet be LEED certifiable.³ The city of San Francisco has taken the most aggressive stance. By 2012, every new commercial development in

excess of 25,000 feet will have to achieve the LEED Gold level or higher.⁴ In San Francisco, a “tourist hotel” is considered a commercial use and therefore covered by the new green building code. Developers considering large hotel projects in any of these three cities would be wise to consult a LEED Accredited Professional. Undoubtedly, other cities will soon follow.

Mandatory LEED Certification: Potential Legal Issues

Whether or not a municipality can require mandatory LEED compliance presents significant legal issues. For one, there is an important nuance between requiring projects to undergo LEED certification versus requiring projects to be LEED certifiable. In order for a project to receive LEED certification, it must undergo an inspection by a “LEED Accredited Professional.” To the extent a city or state requires certification, it essentially has granted USGBC a monopoly in the business of reviewing and certifying buildings for green compliance. This raises concerns that such codes could violate state and federal antitrust laws. On the other hand, if the code as worded requires LEED level compliance as opposed to LEED certification, the monopoly issue is potentially bypassed because other entities besides USGBC could theoretically evaluate the sustainability of the property.

Another legal issue is whether a municipal building ordinance can be regulated by a set of standards that are in flux. USGBC’s ratings systems have undergone various incarnations since inception. The LEED point allocations and credits are not static. In fact, USGBC has publicized a new set of regional credits. Where a building code requires LEED compliance without spelling out what the precise standards are, the ordinance may be impermissibly vague, particularly where the LEED standards change from year-to-year.

On the project level, the major issue is what happens when a project aims for LEED certification and fails. Who is liable: the hotel developer, the contractor, the architect, the interior designer? At least one lawsuit, *Southern Builders, Inc. v. Shaw Development, LLC*, Case No. 19-C-07-011405 (Somerset Cty. Cir. Ct., MD, 2008) dealt with this very issue. With mandatory LEED compliance quickly becoming the norm, more are soon to follow.

The *Southern Builders* lawsuit concerned a condominium project in Somerset County, Maryland. The general contractor on the project, *Southern Builders, Inc.*, filed a \$54,000 mechanics lien against the project in late 2006. In response, the owner-developer, *Shaw Development, LLC*, filed a counter-complaint that included a breach of contract cause of action. *Shaw’s* breach of contract counter-claim arose from the fact that the project ultimately failed to achieve LEED Silver certification.

Shaw alleged that the general contractor’s failure to “construct an environmentally sound ‘green building’ in conformance with the LEED rating system” caused it to lose \$635,000 in Maryland tax credits that it would have otherwise received had the building been deemed LEED

Silver compliant. The parties had relied on the AIA (“American Institute of Architects”) A101-1997 Standard Owner-Contractor Agreement which did not include green building requirements. The only reference to the LEED Silver certification appeared in the project manual which specified: “[the] 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, as specified in Division I [of the specifications.]” But neither the project manual or the building contract specified which party bore the risk in the event the condominiums failed to achieve the LEED Silver rating. The question is still unanswered as the lawsuit was settled out of court prior to trial.

With LEED compliance becoming mandatory, and green projects advancing beyond the planning stages, those involved with green hotel projects must be wary of litigation ensuing when, among other things, a building fails to achieve a promised certification, or when a project meets certification requirements but still fails to provide promised benefits. Green-related litigations are on the rise, and LEED-related issues must be carefully considered by anyone involved with a green hotel.

References:

- 1) http://www.starwoodhotels.com/element/experience/green_vision.html
- 2) <http://www.dccouncil.washington.dc.us/lims/getleg1.asp?legno=b16-0515>
- 3) Jesse W. Abair, Urban Lawyer- Summer, 2008, “Green Buildings: What It Means to be ‘Green’ and the Evolution of Green Building Laws.”
- 4) San Francisco Department of Building & Inspection, No. AB-093

***Daniel Brown** is a partner in the Antitrust practice group and Hospitality group at Sheppard Mullin Richter & Hampton LLP. He is located in the firm’s New York office. Mr. Brown regularly counsels clients in high stakes, complex, commercial litigations and arbitrations in the areas of contract, hospitality, antitrust, fraud, fiduciary duties, banking, employment, and discrimination. Mr. Brown has frequently appeared in federal and state courts in New York and in other jurisdictions pro hac vice, and has successfully argued cases before the Appellate Division, First Department, and Second Circuit Court of Appeals. Mr. Brown has made significant contributions to cases that have been reported in the New York Law Journal, New York Times, and Wall Street Journal. Mr. Brown has also appeared on CNN, NBC and Court TV. Mr. Brown has presented at hospitality and other Continuing Legal Education conferences. He was previously a partner in the law firm of Bickel & Brewer. Mr. Brown can be contacted at 212-332-3879 or dlbrown@sheppardmullin.com.*

***Jonathan Moss** is an associate in Sheppard, Mullin, Richter & Hampton’s Business Trials Practice Group in the firm’s Los Angeles office. He is also a member of the firm’s Hospitality Practice Team. Mr. Moss specializes in commercial and business litigation. His practice entails matters in state and federal court, including business disputes, entertainment contract litigation, copyright infringement, real estate disputes, and allegations of unfair business practice and fraud.*