Green Building Newsletter

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To our clients and friends:

We are pleased to present you with our January issue of Mintz Levin's Green Building Newsletter.

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Law and Policy Updates

Incentivizing Energy Efficiency across the American Economy

BY TYLER C. STONE

Three major sectors of the American economy—industrial, residential, and commercial—are ripe for tremendous energy savings. McKinsey & Company estimates[1] that by 2020, capturing the economy's full efficiency potential will save $442 billion in energy costs and 300 megatons of equivalent carbon dioxide (CO2e) in the industrial sector; $395 billion and 360 megatons of CO2e in the residential sector; and $290 billion and 360 megatons of CO2e in the commercial sector. The total possible savings in energy costs and greenhouse gas emissions are staggering: more than $1.1 trillion and 1,020 megatons of CO2e by the end of this decade.

Moreover, efforts at capturing energy efficiency potential could ripple extensively across the rest of the economy. McKinsey estimates that a $290 billion investment in labor-intensive efficiency measures could create between

500,000 and 750,000 jobs over the next decade. The Center for American Progress makes a similar estimation,[2] suggesting that retrofitting just 40% of all commercial and residential buildings in the United States would produce 625,000 jobs over the next decade and $500 billion in investment to upgrade 50 million office buildings and homes. And these statistics do not include new jobs and markets created by the development of next-generation energy-efficient technologies and industries.

Such figures are impressive, but they come with a cost. An estimated $113 billion in upfront investment is needed for the industrial sector to realize its total energy efficiency potential, $229 billion for residential and $125 billion for commercial.[3] Such upfront costs erect significant present-day barriers to greater energy efficiency, even if they eventually lead to sizable returns on investment. Many industrial, residential, and commercial consumers don't have enough free capital to invest in efficiency upgrades, aren't aware that such upgrades are possible and can generate significant savings, or are hesitant to assume the potentially high transaction costs in implementing energy efficiency measures—particularly in the industrial sector, where upgrades may cause interruptions in production.

Overcoming these barriers is one of the great challenges facing each sector, but consumers need not confront them alone. Federal policymakers have at their disposal a wide range of options that can act as powerful drivers of energy efficiency. Even if, as is likely, the economy's full efficiency potential is never captured, jumpstarting the transition to a more energy-efficient society will require a concerted national effort. Strategic government action is often the crucial spark for economic innovation: from the creation of the transcontinental railroads and interstate highways, to the Apollo Space Program and the Internet, government action has been an essential driver of change. The growing effort to transform the way we generate and use energy—one with the potential to reshape our economic and social landscape—is a challenge on par with sending a man to the moon. Energy efficiency, often regarded as "the lowest-hanging fruit" (or "fruit on the ground," as Energy Secretary Chu likes to say) is an ideal place to begin. Government must assume a leadership role.

To that end, we analyzed a variety of steps the federal government can take to promote greater energy efficiency, and identified policies we think fulfill three key purposes: (1) mitigating the upfront costs each sector must bear to realize energy efficiency savings and curb greenhouse gas emissions, (2) incentivizing the research and development of new energy-efficient technologies, and (3) educating end-use energy consumers on the virtues of greater efficiency. These policies are just a sampling of a broader set of options, but are considered particularly worthy of attention. The ultimate tool for driving greater efficiency—a price on carbon—is not included because its chance of enactment is, at least for the foreseeable future, almost nonexistent. While no argument is made about an ideal policy mix, some combination of ideas from the three major categories (Direct Financing; Tax Incentives; Codes, Standards and Mandates) can amount to a fairly comprehensive approach.

Direct Financing

- Establish a dedicated Advanced Research Projects Agency-Energy (ARPA-E) energy-efficiency grant program to drive

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innovation among companies developing next-generation energy-saving technology and equipment (including smart grid technology). ARPA-E's funding also should be increased dramatically from its current level of $300 million. The vast, multitrillion dollar scale of the energy industry means ARPA-E needs higher funding levels if its initiatives are to have any impact on energy innovation.[4]

- Enact the HOME STAR Program included in legislation currently pending before Congress (S. 3663, the Clean Energy Jobs and Oil Company Accountability Act). The HOME STAR initiative establishes a $6 billion rebate program to drive residential investment in energy-efficient appliances, building mechanical systems and insulation, and whole-home energy efficiency retrofits.
- Establish an Industrial Energy Efficiency Revolving Loan Program (or similar refundable financing mechanism) with maximum financial incentives going to upgrades of industrial processes (i.e., blast furnaces in iron and steel manufacturing) and support systems (i.e., steam systems, motors, building infrastructure, energy management tools).[5] Such upgrades are relatively rare because of the large upfront cost involved in installing new technologies and equipment, the perceived risks of early adoption, and concerns over interrupted production. Direct financial incentives may help address these issues.
- Establish a dedicated Department of Energy (DOE) or Environmental Protection Agency (EPA) grant program for the installation of combined heat and power (CHP) capacity, from large-scale power facilities to smaller on-site units, such as those in commercial buildings, factories, or apartment complexes. CHP technologies that are especially efficient and low-emission, like microturbines, would receive funding priority. It is estimated that an increase in total CHP power from 85 GW in 2008 to 135 GW in 2020 can cut facility-level energy costs by $77 billion and greenhouse gas emissions by 100 megatons of CO_2e.[6]
- Create a Clean Energy Deployment Administration (CEDA)[7] that can finance innovative efficiency projects—in addition to various other energy projects—and provide sustained streams of capital investment for residential, commercial, and industrial energy efficiency retrofits.[8] Such a "Green Bank" would be one of the major driving forces of a deeper federal investment agenda in clean energy and energy efficiency.

Tax Incentives

- Create a tax credit for utilities, municipal power companies, and electric coops that provide support services and incentives to residential, commercial, and industrial customers who install energy-saving technologies and adopt energy-efficient measures. Utilities are in a powerful position to educate customers on the benefits of energy efficiency, and can potentially drive behavioral change and cement energy

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efficiency as a social norm.

- Revamp the existing Energy-Efficient Commercial Buildings Tax Deduction (26 USCS 179D, as amended by the Energy Improvement and Extension Act of 2008) so it is made permanent, increases the level of financial incentives for efficiency upgrades, expands the scope of qualifying energy-efficient improvements (to include energy management tools, among other improvements) and adheres to the most stringent efficiency standards.
- Renew, expand (to $5 billion at a minimum) and make refundable the 48C Advanced Energy Manufacturing Tax Credit (26 USCS § 48C). 48C encompasses manufacturing facilities that produce energy-saving equipment and technologies.

Codes, Standards, and Mandates

- Phase in, over the course of several years, more stringent energy-efficient building codes for new and existing residential, commercial, and industrial buildings. Residences as well as commercial and industrial buildings can be modeled on standards set by organizations like U.S. Green Building Council (USGBC), International Code Council (ICC), or the American Society of Heating, Refigerating and Air-Conditioning Engineers (ASHRAE). Stricter codes will drive property owners and developers to purchase and utilize energy-saving technologies and engage in concerted retrofitting efforts, spurring demand for such technologies and services across the economy.[9]
- Expand the ENERGY STAR voluntary standards and labeling programs to include more residential, commercial, and industrial subsectors, appliances, and systems. The ENERGY STAR labeling program has had some success as a means of educating end-use energy consumers on the virtues of efficiency, but its scope could be broadened considerably. Only 2% of existing homes, for example, have had an energy assessment performed to determine possible energy savings, although ENERGY STAR did capture 17% of new construction in 2008 and an estimated 25% in 2009.[10]
- Establish a national Renewable Electricity Standard (RES) that requires utilities to obtain an increasing percentage of their base quantity of electricity from renewable energy and energy efficiency.[11] A majority of states now boast a RES that includes energy efficiency measures. Alternatively, the federal government could create an Energy Efficiency Resource Standard (EERS) that sets energy reduction targets—broken down by economic sector, industry, and utilities—to be met within a certain timeframe.

Endnotes

1 "Unlocking Energy Efficiency in the U.S. Economy," *McKinsey & Company*, July 2009.

2 "Efficiency Works: Creating Good Jobs and New Markets through Energy Efficiency," *Center for American Progress*, September 2010.

3 "Unlocking Energy Efficiency in the U.S. Economy," *McKinsey & Company*, July 2009.

4 "Post-Partisan Power," *American Enterprise Institute, Brookings Institute, Breakthrough Institute,* October 2010. AEI, Brookings, and Breakthrough also call for the development of "energy innovation" clusters around the country, supported with federal financing, to develop cutting-edge energy technologies.

5 Similar to the State Partnership Industrial Energy Efficiency Revolving Loan Program proposed in S. 1462, the American Clean Energy Leadership Act (ACELA).

6 "Unlocking Energy Efficiency in the U.S. Economy," *McKinsey & Company*, July 2009.

7 Similar to the CEDA proposed in S. 1462.

8 "Efficiency Works: Creating Good Jobs and New Markets through Energy Efficiency," *Center for American Progress*, September 2010.

9 "Efficiency Works: Creating Good Jobs and New Markets through Energy Efficiency," *Center for American Progress*, September 2010.

10 Residential consumers chronically underestimate how much money they can save from retrofitting their current homes. Taken in conjunction with increasing ENERGY STAR penetration into the new homes market, these figures suggest that residential consumers consider energy efficiency a worthwhile investment only when building a new home. Overcoming this perception requires educating consumers on the value and potential savings of retrofitting an existing home, in addition to providing incentives for efficiency upgrades (such as those in the proposed HOME STAR program).

11 Similar to the RES proposed in S. 1462 and Sen. Bingaman's recently proposed standalone RES legislation.

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Overview of the Massachusetts Stretch Code

BY JENNIFER SACCO SMITH

In May 2009, Massachusetts became the first state to adopt a "reach" or "stretch" code above the Commonwealth's base building energy code, which consists of the International Energy Conservation Code (IECC) 2009, further described below, and Massachusetts-specific amendments.[1] In response to municipal demands for additional stringency in the building energy code, the Massachusetts Board of Building Regulations and Standards adopted an optional appendix to the Massachusetts Building Code, 780 CMR. The appendix, Appendix 120.AA, is known as the "Stretch Energy Code" or more simply, the "Stretch Code." While it is optional for municipalities to adopt the Stretch Code, as of November 19, 2010, 64 municipalities in Massachusetts have adopted the new Stretch Code, including the City of Boston and the City of Cambridge. Once municipalities have opted in and adopted the Stretch Code, compliance with its terms is mandatory.

The purpose of the Stretch Code is to increase energy efficiency in buildings across Massachusetts. The Stretch Code regulates the design and construction of buildings for the effective use of energy and is intended to

provide flexibility to permit the use of innovative approaches and techniques to achieve the effective use of energy. The Stretch Code requirements result in 20% greater building efficiencies over the Massachusetts base building energy code. As previously indicated, the Commonwealth's base building energy code is currently the International Energy Conservation Code (IECC) 2009 with Massachusetts-specific amendments. Pursuant to the Green Communities Act of 2008, Massachusetts is required to adopt each new IECC (updated every three years) within one year of its release; the next version will be IECC 2012. During that year of transition, an updated stretch code will be considered and the current Stretch Code is expected to be incorporated into the 2012 state building energy code update, thus making the current Stretch Code mandatory for all municipalities at that time. By putting an optional Stretch Code into place now, expectations are set for the 2012 state building energy code update and municipalities are provided an opportunity for early adoption of the future 2012 state building energy code.

The Stretch Code applies performance measurements to both new construction and renovations of residential buildings and new construction of commercial buildings, but does not require modifications of existing buildings. New construction requirements in municipalities that adopt the Stretch Code are as follows:

Under the Stretch Code, the performance measurement used for residential construction is the Home Energy Rating System (HERS).[2] New low-rise (three stories or less) residential buildings including townhouses are required to (1) obtain a HERS rating of 65 or less for units equal to or greater than 3,000 s.f. of conditioned floor space; (2) obtain a HERS rating of 70 or less for units less than 3,000 s.f.; and (3) demonstrate compliance with the Energy Star Qualified Homes Thermal Bypass Inspection Checklist (visual inspection of framing areas where air barriers are commonly missed and inspection of insulation to ensure proper alignment with air barriers).[3] A HERS index of 65 means that the residence is estimated to use 65% as much energy as the same home built to the 2006 IECC for a 35% annual energy savings.

For additions and renovations to existing residences, either the HERS performance measurement may be used or a prescriptive approach may be used. Under the HERS option, the following is required: (1) obtain a HERS rating of 80 or less for units equal to or greater than 2,000 s.f. of conditioned floor space; (2) obtain a HERS rating of 85 or less for units less than 2,000 s.f.; and (3) demonstrate compliance with the Energy Star Qualified Homes Thermal Bypass Inspection Checklist. Under the prescriptive option, the affected portion of the residential building envelope shall (1) demonstrate compliance with the Energy Star Qualified Homes Thermal Bypass Inspection Checklist and (2) meet or exceed IECC 2009 requirements for climate zone 5 or fully fill existing cavities with insulating material which meets or exceeds an R value of R 3.5/inch.

For new construction of commercial buildings, the Stretch Code uses ASHRAE 90.1-2007 Appendix G (an industry-accepted energy modeling methodology) as the performance measurement and also offers an option of a prescriptive code for small and medium-sized commercial buildings. Large buildings over 100,000 s.f., special energy use buildings (supermarkets, warehouses, and laboratories) greater than 40,000 s.f. in area, and additions to such buildings greater than or equal to 30% of the existing conditioned floor area must be designed to achieve energy use per square foot equal to at least 20% below

the energy requirements of ASHRAE 90.1-2007 Appendix G.

Small and medium-sized commercial buildings between 5,000 and 100,000 s.f. and additions to such buildings greater than or equal to 30% of the existing conditioned floor area where the addition has its own heating system may meet the same 20% better than ASHRAE 90.1-2007 Appendix G performance standard or use a simplified prescriptive method. The prescriptive method requires compliance with certain building envelope requirements, building mechanical system requirements, service water heating requirements, electrical power and lighting system requirements, and one of three compliance options: efficient mechanical equipment, reduced lighting power density, or on-site supply of renewable energy. Commercial buildings smaller than 5,000 s.f., building renovations, and special energy use buildings (supermarkets, warehouses, and laboratories) below 40,000 s.f. in area are exempt from the Stretch Code.

In deciding to adopt the Stretch Code, municipalities must weigh the expected benefits against the anticipated costs. Anticipated costs include higher initial construction costs; however, after energy cost savings on heating and electricity are taken into account, the higher performance standards lead to savings. Noted benefits include meaningful action on energy consumption, cost savings for residents and businesses, increase in design and construction firm competitiveness, and eligibility for Energy Star rebates and utility energy efficiency rebates. One Stretch Code municipality noted that benefits included consumer protection in the form of a marketable performance measure to provide a basis upon which to compare the energy use and cost of operating a building as well as savings over the life of the building. While each municipality will need to evaluate these costs and benefits, property owners and building professionals will need to fully prepare for possible changes and obtain the knowledge to carry out the new Stretch Code requirements.

The full text of the Stretch Code can be found here.

Endnotes

1 The current base building code for Massachusetts is the 8th edition of the base code at 780 CMR (the “MA State Building Code”) which consists of the International Building Code (IBC) 2009 with Massachusetts-specific amendments. The energy conservation provisions of the MA State Building Code incorporate the International Energy Conservation Code (IECC) 2009 with Massachusetts-specific amendments and such energy conservation provisions are included in Chapter 13 Energy Efficiency (Commercial Energy Code) and Appendix J (Residential Energy Code). *See* http://www.mass.gov/?pageID=eopsterminal&L=4&L0=Home&L1=Consumer+Protection+%26+Business+Licensing&L2=License+Type+by+Business+Area&L3=Construction+Supervisor+License&sid=Eeops&b=terminalcontent&f=dps_inf_bbrs_energy&csid=Eeops

2 The HERS Index is a scoring system established by the Residential Energy Services Network (RESNET) in which a home built to the specifications of the HERS Reference Home (based on the 2006 IECC) scores a HERS Index of 100, while a net zero energy home scores a HERS Index of 0. The lower a home’s HERS Index, the more energy efficient it is in comparison to the HERS Reference Home.

3 http://www.energystar.gov/ia/partners/bldrs_lenders_raters/downloads/Thermal_Bypass_Inspection_Checklist.pdf

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Update on Building Energy Use Disclosure under California's AB 1103

BY GABRIEL SCHNITZLER

In 2007, the California legislature passed AB 1103, which mandated that electric and gas utilities maintain "records of the energy data of all nonresidential buildings to which they provide service…[i]n a format compatible for uploading to the United States Environmental Protection Agency's Energy Star Portfolio Manager for at least the most recent 12 months."

Under AB 1103, the owner or operator of a nonresidential building would then be required to disclose the Energy Star Portfolio Manager benchmarking data for the past 12 months to a prospective buyer, lender, or lessee of the entire building.

These disclosure requirements were initially slated to come into effect on January 1, 2010. However, in 2009, the legislature passed AB 531, which indefinitely delayed implementation of AB 1103 by providing that the disclosure requirements would become effective upon adoption of a schedule to be issued by the California Energy Commission.

Draft regulations issued by the Commission in May 2010 would have phased in implementation starting in January of this year, but those regulations have not been adopted. A staff member at the California Energy Commission has indicated that regulations likely will not be implemented until this summer.

Once implemented, AB 1103 could provide greater transparency for California buyers, tenants, and lenders of commercial properties, and owners of commercial properties will need to prepare for the eventual implementation of AB 1103's disclosure requirements. However, AB 1103 does not state what the penalty is for failure to comply with its disclosure requirements, so it is unclear how much effect it will have on energy use disclosure.

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City of Boston Promotes Solar Technology Including Lowering Permitting Fees for Solar Power Projects

BY KIMBERLY A. SIGLER

In November, 2010, the City of Boston approved a new ordinance which cuts the permitting fees for solar power projects by sixty percent (60%) by removing the cost of solar photovoltaic (PV) modules and hardware in the building permit calculation. The PV panels that convert sunlight into electricity are typically the most expensive portion of a solar power installation so subtracting the cost of these panels should significantly reduce the permit fee as to this portion of a project.

Also the City of Boston released a new Solar Permitting Guide as a resource for residents, businesses, and solar installers in the Boston area which details permitting provisions specific to solar photovoltaic technologies and systems in an effort to further the Boston mayor's goal of increasing solar energy

system capacity in Boston to 25 megawatts by 2015. The Guide also describes an online geographical information mapping tool which both tracks the City's progress towards the 25 megawatts goal and allows property owners to do a feasibility analysis of their buildings to explore their solar potential. In addition, the Guide contains general background information about current solar technology, identifies federal and state incentives for PV system installation, and provides information regarding the permitting and interconnection process for PV systems built in Boston.

The announcement regarding the lowering of the permitting fees issued from Boston Mayor Thomas Menino's office provides in part that, "(w)ith this new ordinance, Boston will now have some of the lowest solar permitting fees in the nation," said James W. Hunt, III, Chief of Environmental and Energy Services. "Given the challenges facing solar developers in today's economic environment, we believe that this added incentive will help tip the scales and bring more green development and quality green jobs into our City."

The new Boston ordinance supplements existing federal and state incentives such as tax credit and rebate programs available to encourage development and installation of solar photovoltaic systems in Massachusetts. Solar projects as part of proposed new development and for existing buildings in Massachusetts continue to grow in popularity, fueled in part by these various federal and state tax incentives and rebates, including those provided by the Massachusetts Commonwealth Solar II program, which offers rebates for residential and commercial solar installations of 5 kilowatts or less.

Although the reduction in the Boston permitting fees for solar power projects as a result of this new ordinance may be small as compared to the total cost of an overall project, all of these incentives on the federal, state, and local level which encourage the increase in solar power capacity do start to add up and continue to provide incentives for developers to incorporate solar installations in new development and re-development projects.

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Class Action Filed against U.S. Green Building Council

BY JENNIFER SULLA

In October 2010, Henry Gifford, a vocal critic of the Leadership in Energy and Environmental Design (LEED) ratings system administered by the U.S. Green Building Council (USGBC), filed a class action against USGBC and others in the U.S. District Court for the Southern District of New York. The complaint alleges that USGBC is misleading the public into believing that LEED-certified buildings use less energy than other buildings and is monopolizing the market for energy-efficient market design.[1] The complaint seeks injunctive relief and damages of $100 million, as well as punitive damages and attorneys' fees.

The first—and perhaps only—hurdle is whether the court will certify a class. The complaint alleges four subclasses: consumers who paid for LEED certification for property they own in reliance on claims that LEED-certified buildings use less energy; designers of energy-efficient buildings whose livelihoods were harmed by USGBC's purported anti-competitive behavior;

taxpayers who paid for LEED certification in publicly-commissioned buildings; and tradespersons who lost time and money to comply with LEED specifications. The class allegations are extremely broad and will be, at the very least, difficult to prove. Failure to certify a class may mean the end of the lawsuit, as the complaint (at least in its present form) does not allege that Mr. Gifford himself has suffered any particular harm from USGBC's alleged conduct, except by alleging generic membership in the putative class.

The gist of the complaint is that LEED is based on a point system created by the USGBC[2] and on a computer model of anticipated energy use, not on actual measurements of energy use. The allegations echo Mr. Gifford's disputes with a March 2008 study published by the New Buildings Institute (NBI) and commissioned by USGBC, which stated, "building performance show[s] average LEED energy use 25-30% better than the national average."[3] Mr. Gifford released a paper several months later disputing the NBI's methodology and conclusions.

The complaint alleges that the NBI study was based on voluntary reporting leading to biased data, compared new buildings to new and old buildings, and compared median energy use of LEED buildings to mean energy use of non-LEED buildings. The complaint also alleges that if mean energy use were used, LEED buildings would use 29% more energy than non-LEED buildings. The complaint further alleges that the LEED ratings system does not require third-party verification of the data submitted in certification applications and that the USGBC does not have the staff or expertise to evaluate the applications, leading to "self-certification." USGBC's promotion of the NBI study and its continuing representations that LEED buildings use less energy than non-LEED buildings, according to the complaint, give rise to federal anti-trust, unfair competition and RICO claims, state deceptive trade practices and false advertising claims, and a common law claim for unjust enrichment.

The complaint alleges with broad strokes that LEED certification is based on modeling and not on tracking performance. But LEED certification has never been presented as a guarantee of future building energy performance. Rather, LEED certification means that the design of the building meets a certain standard; once the building starts operating, many factors affect the actual performance of the building, of which the initial design is only one.

Moreover, the complaint does not acknowledge that there are different LEED certification programs, which require actual building performance data. For instance, LEED certification encourages buildings certified under LEED for New Construction (LEED-NC) to enroll in LEED for Existing Buildings at the time of LEED-NC certification.[4] LEED for Existing Buildings relies on actual building operating performance for certification.[5]

In addition, the complaint highlights the difficulties in ensuring that buildings perform as they are meant to perform and in developing criteria for measurements. To these ends, LEED certification processes are evolving. With the introduction of LEED v. 3 in the spring of 2009, the USGBC announced that buildings would be required to commit to periodically submitting energy- and water-use data for a period of at least five years.[6] LEED v. 3 also increases the relative emphasis in the ratings system of reduction of energy use and greenhouse gas emissions associated with buildings systems.[7] The USGBC, in the fall of 2009, launched its Building

Performance Partnership, in which participating buildings would receive annual performance information, comparing predicted or actual performance at the time of certification with the building's current performance in order to address the disparity between how buildings are designed to perform and how they actually do perform.[8]

The complaint also highlights one of the tensions in the LEED certification process by pointing out that it is voluntary and that applicants may essentially "self-certify." It is true that LEED is a purely voluntary process and not run by a governmental authority. With some exceptions, there are no audits, visits, or other third-party verification of the data submitted in support of certification, with certification awarded based primarily on a review of paperwork submitted on-line by the applicant. For instance, LEED for Homes requires two inspections, one before drywall installation and the second just after completion of construction to show that the actual construction follows the design.[9] In contrast, LEED-NC does not require any in-person inspections.[10]

But state and local governments are increasingly requiring new projects to meet LEED standards. Numerous regulatory authorities, including 35 state governments, 58 counties, 384 cities and towns, and 14 federal agencies or departments have various LEED initiatives, including legislation, executive orders, resolutions, ordinances, policies, and incentives.[11] For example, Governor Deval Patrick's Executive Order No. 484 requires, among other things, that all new construction and major renovation projects by the Commonwealth of Massachusetts meet LEED standards. Thus, LEED standards will in many cases have the force of legal requirements.

It is unclear, even assuming that the litigation ever gets to the merits of the claims, whether the factual allegations will stand up in light of the varied and evolving LEED certification processes. Moreover, how the suit proceeds will depend heavily on what discovery shows. Regardless of what happens with class certification or on the merits, the complaint will likely accelerate the already-ongoing discussions in the green building industry as to how best to evaluate whether buildings truly are "green." More to come on February 7, 2011, when by stipulation plaintiff is to file his first amended complaint.

Endnotes

1 The complaint can be found at http://www.mintz.com/newsletter/2011/Newsletters/0867-0111-NAT-RE/gifford_v_usgbc.pdf.

2 LEED awards points to projects based on building performance and design in several different areas: sustainable site development; water savings; energy efficiency; materials selection; and indoor environmental air quality. The level of certification (certified, silver, gold or platinum) depends on the number of total points awarded.

3 The NBI study, entitled "Energy Performance of LEED for New Construction Buildings," can be found at http://www.usgbc.org/ShowFile.aspx?DocumentID=3930.

4 *See* Green Building Rating System for Existing Buildings, Upgrades, Operations and Maintenance, http://www.usgbc.org/ShowFile.aspx?DocumentID=913.

5 *Id.*

6 *See* Minimum Program Requirements, http://www.usgbc.org/ShowFile.aspx?DocumentID=6715.

7 *See* LEED 2009 for New Construction and Major Renovations,

http://www.usgbc.org/ShowFile.aspx?DocumentID=7244.

8 *See* Building Performance Partnership (BPP): Frequently Asked Questions, http://www.usgbc.org/ShowFile.aspx?DocumentID=7743.

9 *See* LEED for Homes Rating System, http://www.usgbc.org/ShowFile.aspx?DocumentID=3638.

10 *See* LEED 2009 for New Construction and Major Renovations, http://www.usgbc.org/ShowFile.aspx?DocumentID=7244.

11 *See* Government Resources, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779.

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