



## 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 & Policy Updates

### Henry Gifford's Lawsuit Against U.S. Green Building Council Dismissed

BY JENNIFER SULLA

A New York federal judge has held that Henry Gifford and three other design professionals cannot sue the U.S. Green Building Council (USGBC) for false advertising under the federal Lanham Act in connection with the USGBC's Leadership in Energy and Environmental Design (LEED) ratings system for buildings. Judge Leonard Sand held that plaintiffs did not have standing under either one of the two tests for standing under the Lanham Act used in the Second Circuit because plaintiffs are not direct competitors of USGBC and could not allege any commercial interest damaged by USGBC's purportedly false statement.<sup>1</sup> But the argument over energy efficiency in buildings and what is a "green building" is far from over.

The litigation began in October 2010, when Mr. Gifford, a vocal critic of LEED, filed a class action against USGBC and others in the U.S. District Court for the Southern District of New York. The complaint alleged that USGBC was misleading the public into believing that LEED-certified buildings use less energy than other buildings and was monopolizing the market for energy-efficient market design.<sup>2</sup> Mr. Gifford alleged anti-trust violations and violations

of the Racketeer Influenced and Corrupt Organizations Act (RICO) RICO, and sought injunctive relief and damages, as well as punitive damages and attorneys' fees.

In February 2011, Mr. Gifford amended his complaint.<sup>3</sup> He no longer sought to represent a class; instead, he added three individual building design professionals as plaintiffs. Mr. Gifford also dropped the more sensationalist anti-trust and RICO claims. The remaining claims alleged false advertising claims under state and federal law and a consumer protection claim under state law. In April, USGBC moved to dismiss the amended complaint.

Courts in the Second Circuit have taken two approaches to standing to assert false advertising claims under the Lanham Act. Some courts have ruled that only direct competitors can sue. Because plaintiffs were alleged to be advisors to real estate developers and others in the design and construction of energy efficient buildings, Judge Sand held that plaintiffs "plainly do not compete with USGBC in the certification of 'green' buildings or the accreditation of professionals."

Other courts have used the "reasonable commercial interest" approach. This approach requires a likely injury and causal connection to the false advertising. Here, the only basis for plaintiffs' false advertising claim was USGBC's press release stating that a 2008 study indicated that new buildings certified under the LEED system perform on average 25-30% better than non-LEED certified buildings in terms of energy use. Plaintiffs alleged that because this statement is misleading it diverted customers from plaintiffs to USGBC.

Judge Sand held that it was "entirely speculative" that every customer gained by USGBC was a customer lost to plaintiffs. Even if plaintiffs could allege a particular example of a lost customer, they could not tie that loss to USGBC's allegedly false statement in its press release. So plaintiffs could not allege either injury or a causal connection with the allegedly false statement.

The court dismissed both the federal false advertising claims and plaintiffs' state law claims with prejudice. Plaintiffs have not appealed.

The end of the litigation, however, is by no means the end of the conversation about energy efficiency and green buildings. Indeed, the litigation has highlighted 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. Under LEED's Minimum Performance Requirements (MPRs), which apply to projects registered under LEED 2009 (except for LEED ND), buildings are now required to commit to periodically submitting energy- and water-use data for at least five years.<sup>4</sup> The relative emphasis in the rating system on reduction of energy use and greenhouse gas emissions associated with buildings systems has also been increased.<sup>5</sup> And the USGBC has instituted the Building Performance Partnership, in which participating buildings 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.<sup>6</sup>

The litigation also highlighted one of the tensions in the LEED certification process, which is voluntary and essentially "self-certifying." But state and local governments are increasingly requiring new projects to meet LEED standards.

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Numerous regulatory authorities, including 34 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.<sup>7</sup> For example, all new construction and major renovation projects by the Commonwealth of Massachusetts must meet LEED standards. Thus, LEED standards will in many cases have the force of legal requirements.

Notably, the court's decision was based on the procedural requirements of standing under the federal Lanham Act and not on the merits of Mr. Gifford's claims. In light of the ongoing evolution of the LEED certification process, this argument is far from over.

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#### Footnote

1 A copy of the order is at [http://www.mintz.com/newsletter/2012/Newsletters/1590-0112-NAT-RE/https\\_\\_\\_ecf.nysd.uscourts.gov\\_cgi-bin\\_show\\_temp.pl\\_file=8923099-0-216521.pdf](http://www.mintz.com/newsletter/2012/Newsletters/1590-0112-NAT-RE/https___ecf.nysd.uscourts.gov_cgi-bin_show_temp.pl_file=8923099-0-216521.pdf).

2 The complaint is at [http://www.mintz.com/newsletter/2012/Newsletters/1590-0112-NAT-RE/Complaint -- Gifford v. USGBC.PDF](http://www.mintz.com/newsletter/2012/Newsletters/1590-0112-NAT-RE/Complaint--Gifford.v.USGBC.PDF).

3 The amended complaint is at [http://www.mintz.com/newsletter/2012/Newsletters/1590-0112-NAT-RE/First Amended Complaint.pdf](http://www.mintz.com/newsletter/2012/Newsletters/1590-0112-NAT-RE/FirstAmendedComplaint.pdf).

4 See Minimum Program Requirements, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2102>.

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

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

7 See Government Resources, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779>.

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## LEED 101: A Look at the Proposed LEED Update – LEED 2012

BY JENNIFER SACCO SMITH

In November 2012, the U.S. Green Building Council (USGBC) hopes to release the next update to the Leadership in Energy and Environmental Design (LEED) green-building rating system, known as LEED 2012. Currently, the version of the rating system used by the USGBC is LEED 2009. LEED is an independent, third-party green building certification system that promotes sustainable building and development practices by defining and measuring “green buildings.” This follow-up to our [previous](#) LEED 101 article takes a broad look at LEED 2012 and the changes that have been proposed thus far.

LEED 2012 proposes technical modifications to each of the LEED certification program's rating systems. The update reworks the rating systems by grouping them under major headings and introduces new categories distinguished by specific building type, sector, and project scope. The five grouped rating system categories are Building Design and Construction (BD+C); Existing

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Buildings: Operating and Maintenance (EB:OM); Homes, Interior Design and Construction (ID+C); and Neighborhood Development (ND). The update proposes 18 rating systems across the five groups. The BD+C group includes the following existing and new individual rating systems: New Construction, Core & Shell, Schools, Retail, Data Centers, Warehouse and Distribution Centers, Hospitality, and Healthcare. EB:OM will contain the following individual rating systems: EB:O&M, EB:O&M Schools, EB:O&M Retail, EB:O&M Data Center, EB:O&M Hospitality, and EB:O&M Warehouses and Distribution Centers. The Homes group covers the Homes (Single Family and Low-Rise Multi-Family) and Mid-Rise (Multi-Family) rating systems. ID+C covers the existing Commercial Interiors, Retail, and Hospitality rating systems. Finally, ND includes the new Neighborhood Development Plan rating system and the existing Neighborhood Development rating system.

Under the new LEED 2012, a number of changes to each of the credit categories have also been proposed including the addition of three new credit categories. The credit categories measure the overall performance of a project by awarding points for credits achieved in each of the categories. The original seven credit categories of Sustainable Sites, Water Efficiency, Energy and Atmosphere, Materials and Resources, Indoor Environmental Quality, Innovation in Design, and Regional Priority will be supplemented by the three new credit categories of Integrative Process, Location and Transportation, and Performance. The number of prerequisites has also increased from nine to fifteen. The prerequisites exist in seven of the ten credit categories. The prerequisites create a basic level of performance among LEED projects and must be satisfied to qualify for LEED certification.

The following is a short summary overview of changes to the credits and prerequisites under the BD+C group of rating systems. For a more in-depth overview of the changes, USGBC has prepared a concise "Summary of Changes Document" which further details some of the proposed changes. <sup>1</sup>

## Highlights of Changes to BD+C between LEED 2009 and LEED 2012

***Integrative Process.*** This new credit category offers three credits, the first two of which go hand in hand. The Discovery: Analyses to Support Integrative Process credit encourages the maximization of opportunities for integrated, cost-effective adoption of green design, and is followed up with the Implementing Synergies credit which rewards teams for using information to make improved design decisions. The third credit, LEED Accredited Professional, was relocated here from the previous Innovation in Design category, but adds the requirement that a LEED AP must have relevant specialty area accreditation.

***Location and Transportation.*** Although this second credit category is also new, most of the credits are not new. The credits have mostly been moved from other categories and renamed. This category has one prerequisite for Sensitive Land Protection but it was also not new as it was moved from another category.

***Sustainable Sites.*** There are no new credits in this category, but the Site Assessment credit was moved from another credit category to more simply analyze and document site conditions prior to design. Also, the previously separate storm-water credits are now combined into one Rainwater Management Credit and the previously separate heat-island effect credits are

also combined into one Heat Island Reduction Credit.

**Water Efficiency.** This category boasts two new prerequisites, Landscape Water Use Reduction, which was elevated from the former “Water Use Reduction” credit, and Appliance and Process Water Use Reduction, which is a completely new prerequisite. Otherwise, the other prerequisites and credits remain the same as LEED 2009.

**Energy and Atmosphere.** The Demand Response credit is the one new credit in this category. Demand Response encourages projects to enhance the optimization of electric generation and to reduce carbon emissions by requiring coordination with the utility and wholesale markets which provide programs or incentives that allow electricity customers to respond to prices as they change over time on a daily or hourly basis. A credit can be earned for participating in utility or wholesale market demand response programs which can include utilities offering rates that reflect the variation in electricity costs over time, or incentives to reduce the electric load at peak times. Other credits in this category under LEED 2009 that addressed measurement, verification, and performance have been moved to the new Performance credit category.

**Materials and Resources.** There are two new prerequisites in this category and several new credits. One new prerequisite, Construction and Demolition Debris Management, outlines specific requirements for waste management policy, including a target diversion threshold and waste reporting requirement. A new credit, Environmentally Preferable Products and Materials, for responsible sourcing of raw materials, expands on existing credits that deal with material origins (rapidly renewable, certified wood, materials reuse). This credit encourages the expansion of responsible sourcing activity in most industries providing raw materials to the buildings industry. A Non-Structural Material Transparency credit requires life cycle analysis and environmental product declarations. This encourages manufacturers to have complete and consistent disclosure practices about their products.

**Indoor Environmental Quality.** In this category, there were not many substantive changes to the credits, but the category did undergo reordering and streamlining. One credit, Construction Indoor Air Quality Management Plan – During Construction, is now a prerequisite. There is a new Indoor Air Quality Assessment credit which expands the scope to address more contaminants than those associated with construction activities. For example, furniture installation is to occur prior to testing of indoor air quality. Also, the Low-Emitting Interiors credit added testing and compliance language.

**Performance.** This new credit category addresses the monitoring and reporting of building energy and water use. The two prerequisites, Water Metering and Building Level Energy Metering, require tenant level installation or use of water and energy resource meters and a commitment to sharing with the USGBC energy consumption data, electrical demand data, and water usage data for a five-year period from the date a project accepts LEED certification. Many of the Performance credits, such as Fundamental Commissioning and Verification and Enhanced Commissioning, were moved from the Energy and Atmosphere category of LEED 2009. Two additional new credits requiring sub-metering of energy and water usage (Advanced Water Metering and Advanced Energy Metering) are also included in this new category.

**Innovation in Design.** The LEED Accredited Professional credit has been

relocated to Integrative Process. The category still, however, provides the opportunity to achieve exceptional performance above requirements set by LEED.

**Regional Priority.** Under LEED 2012, no real changes have been proposed to this credit, as it still provides an incentive for the achievement of credits that address geographically specific environmental, social equity, and public health priorities.

## Synopsis

The differences between LEED 2009 and LEED 2012 involve new credit categories, changes to technical content and a revised point distribution. The USGBC membership vote on the final draft of LEED 2012 is scheduled for late next year. The current proposed changes are still under review, subject to additional public comment periods and committee reviews. Accordingly, the credit language and requirements currently proposed for LEED 2012 can still be modified, augmented, and supplemented.

In crafting LEED 2012, the USGBC has focused on expanding the market sectors able to use LEED, increasing the technical stringency of the rating system, and making the system more user-friendly. With this new version of LEED, the USGBC continues to raise the bar and challenge us to build better, more efficient, and more comfortable buildings in which to work, live, and play.

SOURCE: [www.usgbc.org](http://www.usgbc.org)

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Footnote

1 <http://www.usgbc.org/ShowFile.aspx?DocumentID=9815>

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## ML Strategies Energy & Environment Update

BY DAVID J. LEITER, SARAH LITKE AND DANIEL PHILLIPS

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