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Regulatory Issues that Add to Construction Risk

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Ujval Vyas, Ph.D., Esq.

Wendy K. Soo Hoo

Brian D. Anderson, Esq.

Tiffany Speir, Esq.

Stephen T. Del Percio, Esq.



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**Sharene Rekow, CAE, MSEd, MIM
GBI, VP of Marketing and Membership**



GBI Mission

- The Green Building Initiative is working to accelerate the adoption of green building practices that result in energy-efficient, healthier and environmentally sustainable buildings.

What is the GBI?

- Formed in 2004; 501(c)(3) non-profit
- Headquartered in Portland, OR
- Dedicated to accelerating adoption of green building practices
- Help homebuilder associations start green building programs with their builder members
- Own US License to Green Globes environmental assessment and rating system



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GBI Members/Supporters



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How to Ask Questions:



Polling Question #1

- Which industry do you represent?
 - Architects
 - Engineers
 - Building Owners and Managers
 - Contractors and Commercial Builders
 - Home Builders
 - Developers
 - Government
 - Environmental
 - Manufacturer
 - Legal

Polling Question #2

Have any of you participated on a task force or other group convened to make recommendations to state or local government with respect to green building regulations?

Yes or No

Ujval Vyas, Ph.D., Esq.

- Ujval Vyas is the principal of Alberti Group, a Chicago-based interdisciplinary consultancy specializing in emerging issues in the building industry including sustainability and high-performance buildings, BIM, and alternative project delivery systems. He has lectured and published extensively on legal and business risks in the sustainable building marketplace, covering large-scale policy, insurance, legal, and technical issues. Prior to becoming an attorney, Dr. Vyas taught and lectured at architecture schools at both the undergraduate and graduate levels in the United States and Canada, and served as the director of the Institute for Architecture and the Humanities in Chicago. Dr. Vyas can be reached at uvyas@albertigroup.net.



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Contact Information

Ujval Vyas
Attorney at Law
Alberti Group
uvyas@albertigroup.net
312-862-5099



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Introduction- Ujjval Vyas, Ph.D., Esq.

- Why are we here today and what are some of the risks associated with green building regulatory activity?
- Introduction of speakers and overview of today's format
- How does this panel fit in with our other two presentations?

Wendy K. Soo Hoo - Senior Legislative Analyst

As a Senior Legislative Analyst for the King County Council, Wendy Soo Hoo analyzes and develops legislation related to budgetary issues, fiscal practices, and capital projects.

Prior to joining the King County Council staff, Wendy served as a performance auditor, first at the City of Seattle and then at King County. In this role, Wendy conducted audits and studies that identified and recommended ways to improve accountability, performance, and efficiency of local government programs and agencies.

Wendy graduated from the University of Puget Sound in 2000 with a Bachelor of Arts degree in International Political Economy and a minor in Economics, and was awarded a fellowship to study at the University of Washington's Daniel J. Evans School of Public Affairs. In 2002, Wendy completed her Master of Public Administration degree at the Evans School with an emphasis in Economic Policy.



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Building Accountability into Green Building Legislation

Prior Green Building Legislation (Ordinance 15118)

- Enacted in 2005, expired in 2008
- Required “highest LEED rating that is cost-effective based on life-cycle cost analysis and available funding”
 - County-owned projects only - all new projects & renovations \$250,000+
- Required annual progress report to Council
 - Status of LEED projects and green features

Green Building Policy Update Proposed in 2008

- Policy proposed to Council: All eligible projects required to achieve minimum of LEED Gold
 - No consideration of cost in the proposal
 - Lifecycle cost analysis required only to select systems/technologies to meet LEED Gold and to justify increases to project's up-front budget
 - Projects would have to submit written justification and obtain approval if not able to achieve Gold

Key Question

- *How do we know how much the LEED program really costs the county?*

How much does the LEED program cost the County?

- Fiscal analysis supporting the proposal indicated that fiscal impact would be 0-2%
 - Cited studies on LEED projects
- Council members particularly concerned about fiscal impacts given impending financial crisis
 - \$70 million shortfall in General Fund projected for 2009

King County Green Building Projects

- 4 completed, LEED-rated projects:
 - 3 - Certified
 - 1 - Gold
- 10 incomplete projects or projects in process of achieving LEED rating:
 - 6 - Silver
 - 2 - Gold
 - 1 – Platinum
 - 1 - Gold (Core/Shell) & Platinum (Comm. Interior)

King County Green Building Projects

- 4 completed, LEED-rated projects:
 - 3 – Certified **Unable to provide (2), 6% (1)**
 - 1 – Gold **Unable to provide**
- 10 incomplete projects or projects in process of achieving LEED rating:
 - 6 – Silver **<1 to 4%**
 - 2 – Gold **12-14%**
 - 1 – Platinum **14%**
 - 1 – Gold (Core/Shell) & Platinum (Interior) **<1%**

King County's LEED-related Costs

- Several problems identified in analysis of actual costs or project cost estimates
 - LEED costs for some projects not available
 - Ad hoc analysis prepared for other projects
 - Costs appeared to range from 1-15% with Gold/Platinum at high end – *exceeds the 0-2% cited in studies*

Key Question

- *How do we know if achieving a LEED rating actually has an impact on environmental performance?*

Measuring Post-Occupancy Performance

- No ongoing monitoring of performance
- Not currently tracking:
 - Energy & water consumption cost savings
 - Other operations & maintenance cost savings
- No way to evaluate LEED's stated benefits

Green Building Policy Makeover

- Required to achieve LEED Gold – as long as there is no incremental cost to General Fund and no more than 2% to other funds
- Cost analysis required (30% design):
 - Up-front incremental construction costs
 - Registration/certification costs
 - Present value of operations and maintenance cost savings

Green Building Policy Makeover

- Costs included analysis must be quantifiable, documented, verifiable upon project completion and thereafter
- Reporting requirements now include operations and maintenance costs
- Policy will sunset in 2013

Intent of Legislation

- Create legal/policy framework that balances green objectives with fiscal and accountability objectives
- Ability to evaluate green building program's impact and cost-effectiveness
- Use incremental costs cited in studies as target to hold projects accountable, rather than as blanket justification for certification
- Re-evaluate in 2013 with better information

Contact Information

Wendy K. Soo Hoo

206.296.0352

wendy.soofoo@kingcounty.gov




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Brian D. Anderson

Brian is a Wisconsin real estate and finance attorney with the law firm Axley Brynelson, LLP. He is a LEED Accredited Professional and is Chair of Axley's Sustainable Development Practice Group. He has published numerous articles and spoken frequently on the legal issues related to green building, including speeches at the NAHB National Green Building Conference, the Wisconsin Bar Association annual convention, and an American Bar Association webinar. His work includes drafting green leases in compliance with Green Globes or LEED requirements, creating green development covenants for neighborhoods, advising corporations regarding their green building portfolio disclosures and certification strategies, and counseling building owners, manufacturers, design professionals and others regarding construction contracts and the applicability of various certification regimes and tax incentives.



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Sustainable Building Regulation

Wisconsin and the City of Madison, W – Brian D. Anderson

Sustainable Building Regulation

Wisconsin and the City of Madison, WI

- **Background – Politics of Sustainable Building**
 - Wisconsin - Democratic governor/Republican legislature
 - Madison - Multi-year green city green plan / budget constraints
- **General Observations**
 - State and City regulations almost entirely modeled on LEED or cite only to LEED
 - State policy non-binding, based on modified LEED
 - Minimal thought given to version/type of USGBC/LEED products
 - LEED mistaken as a “standard”
 - Assumption of qualifications pursuant to LEED-AP designation
 - LEED described as subject to third-party verification
 - No phases and no sunset clauses
 - No risk/benefit analysis
 - Assumption that evidence is in on performance, cost, health, productivity
 - USGBC does the work

Sustainable Building Regulation

Wisconsin and the City of Madison, WI

- State of Wisconsin – Executive Order 145 (4/2006)
- City of Madison
 - LEED-Silver for all new Madison buildings (1/2008)
 - LEED-Silver for all TIF projects (proposed)

Sustainable Building Regulation

Wisconsin and the City of Madison, WI

State of Wisconsin – Executive Order 145

- Directed the Wisconsin Department of Administration to, among other things:
 - **set goals** to reduce overall actual energy usage per square foot by at least 10% by FY08 from the FY05 state energy report baseline adjusted for weather and 20% by 2010.
 - **develop sustainable building guidelines** based on the LEED rating system and that recognize the use of forest products certified by the Forest Stewardship Council (FSC), American Tree Farm System (ATFS), and Sustainable Forest Initiative (SFI).
 - provide performance information on a project-by-project basis as part of a **statewide building performance database**; and
 - direct that each state agency and the UW System **assign a lead person** to work with the DOA in the development of the sustainability and energy efficiency goals, the budget and management review, the purchasing of renewable energy, and the implementation of the sustainable building guidelines.



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Sustainable Building Regulation

Wisconsin and the City of Madison, WI

State of Wisconsin – Executive Order 145

- Wisconsin DOA Sustainable Building Guidelines
 - Guidelines must be addressed in all state new construction and major renovation projects but are non-binding
 - Based upon LEED but 19 points omitted; local standards often substituted; (e.g., forest products, storm water management)
 - Subject to DOA oversight and approval (not USGBC)
 - LEED or Green Globes certification accepted only upon DOA approval
- Reportedly suffering difficulty in administration
- Requires signed statements from engineers, architects certifying compliance (e.g, engineer must certify that project will use 20% less water than requirements under Energy Policy Act of 1992)
- Implicates misrepresentation, E & O policy coverage for professionals

Sustainable Building Regulation

Wisconsin and the City of Madison, WI

City of Madison, Wisconsin

- LEED-Silver for new construction/renovation of municipal buildings (1/2008)
 - Applies to any enclosed building *constructed for and/or primarily funded by the City* or built on City land or major renovation of City-owned building
 - Must be *designed, contracted and built* to achieve a minimum LEED-Silver certification and *shall strive for* highest level of certification that project resources and conditions permit
 - Exempts historic properties
 - Exemption available where requirement “would create an unreasonable burden on the construction project or City department” with burden on applicant to demonstrate hardship based upon life-cycle cost basis; if exemption granted, project must still strive for highest number of LEED points possible



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Sustainable Building Regulation

Wisconsin and the City of Madison, WI

City of Madison, Wisconsin

- LEED-Silver for TIF (proposed)
 - Any building project that receives City TIF funding over 20,000 gross square feet. . .is required to achieve LEED certification at the silver level at minimum. . . .” Purpose of TIF?
 - “LEED costs are TIF eligible” Which? Good use of TIF funds?
 - Must obtain “17.5% better than current version of ASHRAE energy standard” or “install on-site renewable energy equal to at least 3% of the total energy cost” Why these two?
 - LEED checklist must be submitted with application for TIF funding
 - “A portion of TIF funding will be clawed back in the case of *noncompliance* with LEED certification as *determined by the city*”

Sustainable Building Regulation

Wisconsin and the City of Madison, WI

Conclusions and Recommendations

- Design professionals need to understand risks
- LEED certifiable rather than certified
- Authority of local officials to review
- Need for appeals process
- Realization that certification regimes are not “standards” but checklists and theories of urban planning
- Plan for failure to achieve certification
- Need to include sunset provisions or other means of reconsideration
- Phased implementation
- Focus on limited, regionally valued criteria
- Focus on ongoing performance/maintenance (Green Globes or LEED-NC + new LEED-EB)
- Education of architects, engineers, attorneys
- Base incentives on commissioning data
- Consider durability/resiliency as an environmental good



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Contact Information

Attorney Brian D. Anderson
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Madison, Wisconsin 53703
608.283.6795 (direct)
608.257.5444 (fax)
800.368.5661 (toll free)
banderson@axley.com



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Tiffany Speir **Government Affairs Director** **Tacoma-Pierce County Built Green® Administrator**

Tiffany Speir is a graduate of the University of Utah and Seattle University School of Law, and is a current member of the Washington State Bar. She joined the MBA of Pierce County staff in 1998 and currently serves the association's Government Affairs Director, working with local governments on issues affecting residential construction.

In 2003, Ms. Speir and the MBA partnered with the Department of Ecology, the City of Tacoma, and Puget Sound Energy to launch the Tacoma-Pierce County Built Green® program. Since its launch, over 3700 homes have certified through the program, as have several large developments, including Cascadia, a master planned community that will eventually have over 6500 homes within it.

Ms. Speir is President of Built Green® Washington, a 501(c)(3) entity that serves as a coordinating body for the local Built Green® programs located throughout Washington State. She has also worked extensively with the National Association of Home Builders (NAHB) as it has developed its National Green Building Program.



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Residential Green Building Programs and Legislation – Tiffany Speir

Residential Green Building Programs and Legislation

- Existing Voluntary Residential Green Building Programs
 - Home Builder Association programs
 - Built Green® Programs in Washington State
 - Elsewhere in US
 - Other programs (LEED-H, Earth Advantage, etc.)
 - NAHB Green Building Program
- ICC Green Building Standard

Residential Green Building Programs and Legislation

- Recent Legislation in Washington State
 - State requirement for LEED Silver in state funded buildings
 - Non-Profit Builder Requirements
 - HB 3120
 - Local government actions

Residential Green Building Programs and Legislation

- Issues with mandating green building
 - Ignorance of regulators/bill drafters
 - Private programs = loss of government control, potential bias/slant of private drafters
 - Private programs = no government control but government blessing
 - Loss of flexibility if enacted in code
 - Loss of private industry engagement/support if in code

Residential Green Building Programs and Legislation

- Options to legislative/regulatory mandates
 - Legislate performance vs. getting a certificate
 - Energy efficiency
 - Recycled content / waste reduction
 - Allow for incentives vs. requirements
 - Award incentive if performance there vs. just certification if trying to achieve a specific goal
 - Federal/state/local government participation in existing programs
 - Ex. – Department of Ecology in WA

Residential Green Building Programs and Legislation

- Problems with focusing only on new construction
 - New home production vs. existing housing stock
 - 2% of housing stock built per year
 - Retro-fit where the most benefit lies
 - Existing housing stock 98% of annual inventory
 - Code updates post-1992
 - Construction techniques overall

Contact Information

Tiffany Speir, Esq.
MBA of Pierce Co.
(253) 272-2112 ext. 105
tspeir@mbapierce.com



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Stephen Del Percio, Esq.

- Stephen Del Percio is a construction attorney in the Manhattan offices of Arent Fox, where his practice focuses exclusively on assisting clients in the design, construction, and real estate industries on matters ranging from construction contract and corporate drafting to litigation. Mr. Del Percio holds a degree in civil engineering and worked as project manager on a high-rise office building in Times Square prior to becoming an attorney. He is a frequent author and lecturer on green building issues and is also the publisher of greenbuildingsNYC, an online journal that profiles green projects in the New York City area, as well as discusses the broader legal issues implicated by green design and regulation. Mr. Del Percio can be reached at delpercio.stephen@arentfox.com.



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Brief Survey of Existing Legislative Schemes

- **Boston, MA**
 - Location-specific credits
 - Branch of local government created to review applications; USGBC kept out of the loop
 - “LEED Certifiable” and insurance implications for design professionals?
- **Washington, DC**
 - Poorly-drafted legislation
 - Letter from McCallum
 - Incorrect use of term “performance bond”
 - Key concepts left open
 - Conflict of interest
- **Babylon, NY**
 - Incorporates LEED by reference into local building code
 - “Town of Babylon hereby adopts . . . LEED-NC V2.2 and, further, **automatically adopts** any future versions promulgated by USGBC.”
 - Local government does not participate in USGBC decision-making process

LEED Creep: Gaia Napa Valley Hotel Project

- **LEED Creep**
 - Defined in 2006 *Building Design + Construction* Magazine Green Building White Paper as public LEED mandates “creeping” over to private projects
- **Gaia Napa Valley Hotel, American Canyon, California**
 - Opened November 2006
 - Obtained LEED Gold Certification in July 2007
 - Local ordinance offered \$1 million tax rebate for occupancy tax revenues
 - *“Until they **have the designation**, they don’t get the credit. They will be responsible for collecting the occupancy tax and rebating it to the city.”* – City Manager Richard Ramirez
 - Case law exists where owner sought damages from contractor in amount equal to tax credit; direct byproduct of failure to understand legislative regime and use of form contracts without any risk transfer provisions.

Specific Legal Problems with State and Local-Level Green Legislation

- **Undemocratic?**
 - Removes control over local building code or zoning ordinance from public oversight and transfers compliance to third-party organization
- **Unconstitutional?**
 - Provisions of referenced rating system challenged as “arbitrary and capricious, not bearing any substantial relation to the public health, safety, and welfare?” (*Euclid versus Ambler Realty*)
- **Violative of antitrust?**
 - Manufacturers or suppliers excluded from rating system and thus market as legislation proliferates?
- **Pre-empted by federal activity?**
 - *AHRI et al. v. City of Albuquerque*
 - Local Energy Code exceeds requirements of U.S. Department of Energy for HVAC equipment; scheme challenged by Air Conditioning Contractors of America via lawsuit in federal District Court; delay in Code’s implementation until October; legislation signed back in January.

Suggested Legislative Best Practices

- **Maintain oversight and demand transparency**
 - Don't essentially leave certification verification, permit approvals, TCO receipts, etc. at the feet any other third-party organization over which your local government does not exercise oversight
- **Protect your municipality from attack on grounds that legislation is “arbitrary and capricious”**
 - Insist on verifiable, performance-based data when making legislative decisions
- **Demand that legislation allow for more than just one rating system**
 - Antitrust issues are still murky; emphasize product, not process
- **Pre-emption case law is vast and complicated**
 - New Mexico case could have broad implications, particularly if new administration is as active as anticipated at federal level.

Contact Information

Stephen T. Del Percio, Esq.
Construction Attorney, **Arent Fox LLP**

1675 Broadway

New York, New York 10019-5820

212.457.5542 Ph | 212.484.3990 Fax

delpercio.stephen@arentfox.com | www.arentfox.com

www.greenbuildingsNYC.com



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For More Information:

- To learn more about becoming a member of the GBI please visit: <http://www.thegbi.org/commercial/use-green-globes/join.asp>
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Panel Discussion & Questions from Audience



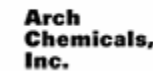
Polling Question:

- What did you think of today's webseminar?
 - Very valuable
 - Valuable
 - Neutral
 - Not very valuable
 - Not valuable at all

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