

Gifford Leads the Way in LEED Litigation

The purpose of this article is to draw your attention to a potentially important new development in the world of “green” building design and construction. A new case filed in federal court in New York calls into question the validity of the United States Green Building Council’s LEED certification program. Read on...

A Brief History of LEED

In the last decade, sustainable construction and environmentally conscious project design have become areas of considerable focus, interest, and (inevitably) revenue. At the forefront of this movement is the United States Green Building Council (“USGBC”) through its Leadership in Energy and Environmental Design (“LEED”) certification program. According to the USGBC, LEED certification “provides independent, third-party verification that a building or neighborhood development project meets the highest green building and neighborhood performance measures.” There are several different levels of LEED certification (Certified, Silver, Gold, and Platinum), each based on compliance with a rating system that provides a point value for various project design, construction, operations, and maintenance techniques. Since 2008, LEED certification has been through the Green Building Certification Institute, an entity established to administer project certification through the USGBC’s LEED ratings systems.

While not the only such game in town, LEED is currently the leader used by both public and private entities for evaluating projects, both in California, and nationwide. In fact, many building approvals are now made contingent on achieving particular levels of LEED compliance, and LEED standards have served as the models for many green building ordinances. Not surprisingly, this service comes at a price. Depending on the size of the project, LEED certification can cost anywhere from \$2,900 to over \$20,000 for a building over 500,000 square feet.

LEED is Called on the (Environmentally Friendly) Carpet

It was inevitable that LEED would somehow become the subject of litigation. With *Gifford v. U.S. Green Building Council*, filed on October 8, 2010 in the Southern District of New York, the day has arrived. *Gifford* concerns a study commissioned by the USGBC in March 2008, and performed by the New Buildings Institute (“NBI”) concerning performance of LEED buildings versus non-LEED certified projects. The case is filed as a class action, and includes causes of action for fraud, unfair competition, deceptive trade practices, false advertising, wire fraud, and unjust enrichment. The lawsuit claims that the USGBC’s 2008 study concerning more efficient energy use in LEED certified buildings is fraudulent. The claim seeks \$100,000,000 in damages for consumers who were “defrauded of the costs” of LEED certification, as well as punitive damages and attorney’s fees.

The lawsuit alleges that the USGBC is fraudulently misleading consumers by intentionally omitting material information from the NBI study, including that the NBI study sample covered only 22% of LEED certified buildings, that fewer than half of the LEED certified buildings responded to the NBI study survey, and that half of the respondents were eliminated from the study sample. The lawsuit goes on to claim among other things that the USGBC is intentionally not disclosing that owners of LEED certified buildings have a “vested interest in boosting the value of the LEED certification for which they paid a substantial premium,” that LEED certification does not require verification of data submitted in certification applications, that the USGBC “does not have the staff or expertise” to evaluate the applications, as well as stating that the LEED sample buildings in the NBI study were all built or renovated after 2000 while the comparison



buildings date back as far as 1920, further “skewing” the study’s results. Plaintiffs also claim that LEED certification “is primarily designed to generate enormous profits for USGBC by requiring countless purchases from among USGBC’s proprietary product line,” such as certification fees, building plaques, project registration fees, application fees and the like.

Note that the entire case in *Gifford* hinges on one study – as LEED proponents point out, hardly a representative sampling of the numerous other studies that have been undertaken in the last several years. LEED proponents further point out that the case focuses too narrowly on energy use issues, and disregards other factors such as water efficiency, indoor environmental quality, materials and resources used, and building location. Either way, the *Gifford* case will draw considerable attention to the LEED certification process, from both the provider’s and the consumer’s perspective.

Where Will This Lead?

At this point, the merits of the claims in the lawsuit have not yet been addressed, but should the class action be certified, it may result in numerous additional lawsuits as members of the class “opt out” of the class action and pursue their own individual claims. This has the potential to affect anyone who has paid for LEED certification services, including readers of this article. While it remains to be seen how *Gifford* will resolve, it does point out the new and ever-increasing awareness of those in the building industry concerned with sustainable construction, green and environmentally conscious project design, and the complex legal questions they raise. Please feel free to contact the authors with any LEED and other “green” construction questions you may have. Stay tuned for further developments.

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