



SPEEDING THROUGH THE 'GREEN' LIGHT: PART ONE

Legal Issues Presented by Municipalities' Pursuit of a More Sustainable Built Environment and Use of the LEED® Standard By John McGowan, Esq.

This article is the first in a two-part series exploring the unique, two-pronged role of municipalities in creating a more sustainable built environment. The first article, below, explores the role of the municipality as a "land user"—as the owner and operator of a substantial stock of public buildings and property. The second article, to be published in the June edition of New Hampshire Town and City, explores the role of the municipality as a "land use regulator"—as the creator and enforcer of codes and regulations that determine how private-sector buildings are sited and constructed.

The Municipality as a Land User

Municipalities are in the business of protecting and promoting the public health, safety and general welfare (collectively, the "public good"). Municipalities that appropriately exercise their authority and police power to address today's compelling environmental and public health issues should be applauded and encouraged. The prospect of a built environment blooming with low impact, energy efficient and occupant-friendly projects as far as the eye can see certainly is consistent with the public good. It is no surprise that throughout New England and the nation hundreds of municipalities have committed themselves to ensuring that all new municipal construction or major renovation meet a green standard—usually one of the Leadership in Energy and Environmental Design (LEED) standards promulgated by the U.S. Green Building Council (USGBC).

Municipal green building projects do not present more legal issues than traditional, or "brown," municipal building projects. The issues are just slightly different. Green building, after all, offers us a very different way of designing, building and maintaining our built environment. As towns and cities venture into the exciting new world of green building, they should, as always, do so with eyes wide open. Green building is a relatively new phenomenon. There are, as with any new process, some "kinks in the chain" that practitioners are starting to notice. Municipalities that want to go green with their building construction are wise to seek appropriate guidance to protect their interests, minimize risk and maximize the benefits of this exciting new breed of construction. The vast majority of major municipal building projects, green or brown, go off without a hitch, especially when these issues are addressed and resolved early and clearly.

The Greening of the Golden Rule

Those with the gold make the rules. Municipalities, as the owners and developers of property and buildings, are party to many public construction and building contracts, whether for a new high school, a new town hall, a new fire station or a new stock of public housing. These contracts and agreements, along with Requests for Proposals and Qualifications and invitations to bid, increasingly require construction in accordance with one of the LEED standards promulgated by the USGBC. LEED is the widely accepted benchmark for the design, construction and operation of high-performance green buildings.

The USGBC expands LEED into new genres of construction and tailors existing programs every year based on user-feedback and the most current building science and research. The USGBC is a mission-focused, nonprofit organization established in 1993 to support and promote sustainable building design and construction practices. General contractors, project managers, architects, engineers, planners, developers, business leaders and policy makers, among others, comprise the USGBC. The USGBC developed LEED in 1995. The first wave of LEED projects has now had the opportunity to perform and be the subject of evaluation and assessment.

Prevalence of the LEED Standard: Rigor and Flexibility

Two of the greatest strengths of LEED are its rigorous third party verification system and its flexibility for various construction scenarios. The same rigor and flexibility applies regardless of the size or nature of the project. Proposed LEED projects undergo a scrutinizing review by the USGBC. The review combines elements of building code and site plan review. The core metrics are Site Selection (SS), Water Efficiency (WE), Materials and Resources (MR), Energy and Atmosphere (EA) and Indoor Environmental Quality (EQ). The USGBC utilizes other metrics depending on the specific rating system for which a project has applied, including credits for Innovation and Design Process (ID). The USGBC offers several different rating systems. LEED for New Construction and Major Renovations (LEED-NC) applies to new commercial, institutional and high-rise residential buildings. LEED-NC is the most popular LEED rating system.

Municipalities are well-situated to pursue LEED projects in light of RSA 674:54 and the general rule that municipal zoning ordinances do not apply to municipal construction. LEED has many elements that are more related to zoning than to the building code. Where such elements in a private development context may create a conflict between local zoning and the LEED standard, that conflict may not exist when the project is a municipal project.

LEED for Existing Buildings (LEED-EB) applies to building operations such as the upgrade of mechanical systems, fixtures and lighting. As land users, LEED-EB is of special interest to New Hampshire municipalities that wish to merely upgrade or fine tune their stock of existing municipal buildings, as opposed to engaging in new construction or major renovation.

The effectiveness of the USGBC third party verification system is partly based on the reliance on several existing, widely-acknowledged industry standards promulgated by professional organizations like the American Society of Heating, Refrigeration and Air Conditioning Engineers and the American Society for Testing and Materials. Third-party verification, such as that achieved through the USGBC's project review process, is critical to ensure that project owners and developers are not "greenwashed" by architects, engineers or contractors who claim to design and construct a green building that, in reality, is only lipstick (green) on a pig. The flexibility of LEED stems from the different levels of certification available for different buildings and the different methods for achieving such certification. For example, LEED-NC offers four levels of certification: Certified, Silver, Gold and Platinum. LEED-NC offers a variety of different credits, or points, from which a project can achieve its desired level of certification. The other LEED standards offer a similar variety.

Nationwide, hundreds of municipalities build only LEED projects for all new construction or substantial renovation of municipal buildings. In New Hampshire, the Town of Derry maintains a policy that requires all new construction or major renovation to town-owned or town-funded projects to achieve the LEED Certified level of certification. Many communities, like the City of Portsmouth, utilize LEED on a case-by-case basis for their public buildings. Whether municipal construction projects utilize LEED voluntarily or through voter-mandate, municipalities, as project owners and parties to major contracts involving public money, bear a political responsibility to their taxpayers to ensure that municipal building projects are completed on time, on budget and that buildings perform in the long run.

The Promises of Integrated Design—and Potential Pitfalls

Integrated design is a hallmark of green building and a critical component of any LEED project. Integrated design encourages a holistic design-build approach that spreads responsibilities and obligations among development team members (owner, architects, engineers, project manager, general contractor and subcontractors) to encourage communication and collaboration early and throughout the process. Integrated design sounds nice. It is no panacea. Integrated design does not automatically make achieving the typical goals of on time, on budget and long term performance any easier than the traditional, linear and segregated-role design and construction process.

In practice, integrated design can be rife with liability and risk issues. This is especially true with LEED projects and the additional layer of review and scrutiny that LEED projects receive through the USGBC. The problems often stem from the fact that integrated design is a different process than the traditional construction process, which is more linear and segregated. Contracts and documents must be carefully drafted to promote the likelihood that project will achieve its LEED or green goals effectively and without disagreement. While general rules of contract law always apply, LEED project contracts may require allocating certain risks and responsibilities based on a party's responsibilities for achieving certain LEED credits/points.

All parties to integrated design projects must endeavor to appropriately allocate risk to avoid disputes. Architects, engineers and contractors have begun to include clauses in their contracts to protect themselves, explicitly stating that they do not guarantee a certain level of LEED certification or a certain level of energy efficiency. The responsibilities for achieving the desired level of LEED certification should be expressly identified, as well as the responsibilities for achieving individual LEED credits. Municipal counsel may be able to assist in ensuring that project risks and responsibilities are appropriately allocated to ensure that the interests and goals of the municipality are protected and achieved. The more explicit that the responsibility for achieving certification is, the more likely it is that the certification will be achieved.

Making Your Case to the U.S. Green Building Council

The USGBC reviews hundreds of new applications for LEED certification every day, as the popularity of LEED explodes. The USGBC has become a unique adjudicatory body of sorts. Like a local land use board or a court, the USGBC has a limited amount of time and resources to commit to reviewing an application or request pending before it. It is critical for a LEED applicant to "get it right" the first time. Municipal counsel, or a LEED Accredited Professional, may be able to assist the municipality in presenting the LEED certification information and relevant project details to the USGBC as effectively and succinctly as possible.

After the Honeymoon: Warranties and Representations

LEED projects are often characterized by at least one innovative product or system. Composting toilets, recycled greywater systems, pervious pavement, solar panels and vegetated roofs are common. All innovative products and systems, in the recent past, were experimental products and systems. Many innovative products and systems lack a long-standing track record. It may be difficult to "shop around" and compare. The uncertainty places added responsibility on municipalities to ensure that the manufacturers and/or the installers of the products and systems are contractually obligated, via appropriate warranties and to the extent that is legally appropriate, to service the products and systems should problems develop. Municipal counsel may be able to assist in effectively negotiating for the best possible warranties for the municipality, so as to minimize risk and maximize the benefit to the municipality of the green products or systems.

The use of such products and systems may also require the municipality to think ahead in a way that it normally may not need to. For example, the municipality may seek to build its new community center on a parcel in the

busy downtown commercial district. If, like many green or LEED projects, the new building will utilize or rely on solar energy, then the municipality should endeavor to protect the new building's ability to effectively harness the sun. The construction plans of future abutters, especially to the south, may interfere with that ability. A solar skyspace easement may be in order. See RSA 477:50 (Creation of a Solar Skyspace Easement).

Development team members on green projects may also be more inclined to make representations, perhaps unrealistic at times, about a project's future performance, for example, in terms of reduced energy use or more efficient water use. Building owners and developers may rely, to their detriment, on these representations when performing the cost-benefit analysis as part of their decision to pursue LEED certification, or when attracting financing or currying public favor for the project. Whether that reliance was reasonable is the question. The pursuit of LEED certification usually involves higher initial or sunk costs than a traditional project. It is important for the municipality to ensure that its costs and risks are minimized and that it derives the maximum benefit possible from its new green building.

Conclusion

Protecting and promoting the public good can be a difficult business for municipalities. Municipalities that want to do their part by building green should not be discouraged or frustrated by some of the unique issues presented by this different way of designing, building and maintaining our built environment. However, a little extra discretion and some added scrutiny may be in order if municipalities are to fully benefit from the promise and potential of the green building movement.

Attorney John McGowan is an associate at Donahue, Tucker & Ciandella PLLC in Exeter and Portsmouth, NH. He practices in the firm's municipal, land use, real estate and litigation practice groups. He is certified through the U.S. Green Building Council as a LEED Accredited Professional (LEED AP). He may be contacted at jmcgowan@dtclawyers.com or 603.778.0686.

This article originally appeared in the May 2009 edition of the New Hampshire Local Government Center's *New Hampshire Town and City* magazine.

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