

Green-house Counsel

sponsored by

MANKO | GOLD | KATCHER | FOX^{LLP}

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE



THE LEGAL SIDE OF LEED

by [Brenda H. Gotanda](#) and [Meredith DuBarry Huston](#) – Manko, Gold, Katcher & Fox, LLP

Whether motivated by sustainability goals or economic benefits, many businesses are looking to “green” the buildings in which they operate. Green buildings can offer many benefits ranging from lower energy and operating costs to improved working environments and increased marketability. These benefits often derive from an increased attention to resource conservation and efficiency throughout the building’s life cycle. Many companies who pursue green building seek to have their buildings certified under the [U.S. Green Building Council’s Leadership in Energy and Environmental Design \(“LEED”\) certification system](#). LEED or similar third-party certification systems can provide an objective measure of a building’s “green”-ness. When your company decides to pursue LEED certification, you should be prepared to consider and address the legal issues that may arise.

How are LEED Projects Certified?

[LEED](#) is a voluntary certification system built around a flexible framework that evaluates building design/construction or operation/maintenance in the following categories: sustainable sites, water efficiency, energy and atmosphere, materials and resources, and indoor environmental quality. The framework employs a [100-point scale](#) and project applicants are permitted to self-select the points (called credits) they wish to pursue across the categories in order to achieve the base number of required credits. To become LEED “Certified” your project must satisfy obligatory prerequisites and achieve a minimum number of credits. Projects achieving credits above the minimum number may be certified at higher levels, including Silver, Gold, or Platinum. [The Green Building Certification Institute \(“GBCI”\)](#) currently administers the [LEED certification program](#) and awards [LEED project certifications](#) after issuing determinations as to whether each credit attempted in the certification process have been achieved or not.

Are Appeals Available?

In the event that GBCI issues an unfavorable determination related to your project, such as a notice that your project has not achieved attempted credits, prerequisites, or met minimum project requirements, you can [appeal the determination](#) (see e.g. “Appealing a Review” in LEED for New Construction). GBCI has a two-tier appeals process. A first level appeal to GBCI will be decided by GBCI representatives who were not involved in the challenged determination. If you are not satisfied with the decision in the first level appeal, you can elevate it to a “final level” appeal. The review in a final level appeal will be performed by an impartial three-person Appeals Board. Appeals are also available for [credit interpretation rulings](#) issued by GBCI in response to project applicant inquiries for guidance on how specific credits pertain to their projects.

- more -

THE LEGAL SIDE OF LEED (cont'd)

How Should Design and Construction Contracts Address LEED?

To protect against the risk that a project may fail to attain certification or a desired level of certification, LEED certification requirements should be specifically addressed in design and construction contracts. Contracts should specify the applicable certification and level to be achieved, the parties responsible for various aspects of the certification process, including document management and credit submission, the timing for completion, inspection of work requirements, incentives or tax credits to be obtained as a result of the certification, timing required for completion, product specifications and substitution limitations, insurance provisions, and any regulatory requirements that must be met. Contracts should also define damages to be awarded for any failure to achieve certification or failure of any building systems or components upon which certification is based.

Once Certified, Can We Lose Our Certification?

The most recent iteration of LEED (LEED 2009) contains certain [minimum program requirements \("MPRs"\)](#), which must be complied with in order to achieve – and retain – your certification. The MPRs include, among other things, a requirement to comply with environmental laws and a five-year [commitment to share whole-building energy and water usage data with USGBC](#). USGBC reserves the right to revoke certification from any LEED project upon gaining knowledge of non-compliance with any applicable MPR. USGBC issued a [Supplemental Guidance in November 2009](#) to provide additional clarification regarding the MPRs. It is important to understand the MPRs and to incorporate provisions into your building contracts and leases to ensure compliance by all parties who could impact your certification.

Also, should certification be sought under [LEED for Existing Buildings: Operations and Maintenance](#), it is important to understand that this standard is unique in that it evaluates and measures compliance over time and will expire if not renewed within the required timeframe. The ongoing requirements of this standard should be addressed in any contracts that could impact upon compliance, including housekeeping, maintenance, insurance, leases, etc.

Be Prepared, Avoid or Manage the Risks.

Green building, and LEED certification, raise unique [legal issues and liability risks](#). Counsel can reduce those risks by becoming familiar with the LEED process and evaluating how the new and evolving risks can be managed to leverage the opportunities presented by green building. For further guidance, consider retaining a [LEED Accredited Professional](#) to assist with your project.