

# MID ATLANTIC REAL ESTATE JOURNAL

NEW JERSEY-PENNSYLVANIA-DELAWARE-MARYLAND-VIRGINIA

Friday, October 9, 2009

Volume 21, Issue 10

## GREEN AWARENESS

### By Meredith DuBarry Huston, Manko, Gold, Katcher & Fox, LLP **LEED Certification, Decertification, and Downcertification. Be Prepared.**

**A**re you looking for a way to gain tax credits, expedited permitting, or premium rents for an upcoming project? Do you want your project to use energy, water or other natural resources more efficiently? You may want to pursue LEED (Leadership in Energy and Environmental Design) certification for your project. The widely recognized LEED benchmark provides for third party verification of a project's sustainability performance by the Green Building Certification Institute (GBCI). Using a checklist, projects including new residential and commercial construction, schools, hospitals, and even neighborhoods, are awarded points for measures including site selection, indoor air quality, water conservation, energy efficiency, and use of recycled or sustainably sourced materials. Buildings are rated as Certified, Silver, Gold, or Platinum based on the number of points achieved.

While the potential benefits of LEED certification are evident, that does not mean that projects seeking LEED certification are without risk. LEED is an evolving system



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and its most recent evolution requires a continuing commitment to ensure the sustainability of your project beyond its completion. Under most prior LEED iterations, once a project received its certification plaque, it was considered to be forever certified. However, under LEED 2009, GBCI has the option to revoke or revisit the level of a project's certification in the event of non-compliance with a minimum program requirement. Project owners must consider the potential ramifications of possible decertification or "downcertification" (e.g., Gold to Silver) for anticipated tax benefits or other incentives and for contracts for sale or lease which are contingent

on LEED certification.

In its most recent evolution, among other minimum program requirements, LEED will require all newly constructed buildings to provide energy and water usage data for the first five years of operation as a condition of certification. To mitigate the risk of decertification, contracts should clearly identify and assign responsibility for the maintenance and submission of required data, should allocate the risks associated with failure to supply required documentation and address the consequences of decertification. Where projects change hands once construction is completed, project owners must ensure that subsequent owners and/or occupants are notified of and comply with the data submission requirement.

Under LEED, efficiency points are often awarded with the use of predictive models. However, once occupied, actual performance may not follow predictions. It remains unclear whether GBCI will decertify or downcertify projects who comply with the data submission requirement, but whose submitted building energy and

water usage data does not, in fact, meet credit requirements. Given that the performance data requirement arises from a concern that LEED certified buildings are not actually achieving their predicted performance gains, GBCI could determine that LEED credits or prerequisites were granted based on an erroneous determination and exercise its option to decertify or downcertify a project where a completed project underperforms. Ultimately, LEED may require continuing verification of green building performance claims.

If you decide that LEED certification is right for your project, prepare to address LEED's evolving requirements with appropriate project planning, contract language, insurance, and information disclosures.

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