

# Construction Law

A supplement to:

The Legal Intelligencer

 PENNSYLVANIA  
**LawWeekly**  
CONSTRUCTION LAW

August 17, 2009

## Green Buildings: Are You Getting Real Energy Efficiency Now?

BY EDWARD B. GENTILCORE

*Special to the Legal, PLW*

A lot of both soy-based and other ink has already been spilled in communicating the significant trend of “green building.” While a final and definitive statement of what “green building” means remains elusive, this topic has been the subject of much debate in educational and construction industry circles.

One of the significant forces behind the development of buildings that are more in sync with current energy and environmental sensibilities is the goal of reducing resource impacts from both the construction process itself as well as the constructed buildings’ occupancy and operation.

Many case studies, which support the development of these green buildings, provide statistics about the construction industry’s generation of debris, its electrical and water consumption as well as similar impacts derived from the structure’s erection and use. However, there are many other studies, some of which have more recently come under fire, indicating that there are a host of non-statistical benefits enjoyed by the inhabitants and owners of green buildings. These include, among other things, increased job and testing performance as well as a generally greater feeling that the building being occupied is “healthier.”

The rapid expansion of these projects has been stimulated by the marketing and support of non-governmental entities through the development of independent rating systems that seek to define a level of energy performance associated with a building. Examples of these entities include the U.S. Green Building Council’s Leadership in Energy and Environmental Design (LEED) (found at [www.usgbc.org](http://www.usgbc.org)), as well as the GreenGlobes program developed and administered in the United States by the Green Building Initiative (found at [www.theGBI.org](http://www.theGBI.org)).



**EDWARD B. GENTILCORE** is a partner in the Pittsburgh office of Duane Morris, and serves as vice chair of the firm’s construction group. He practices in the areas of construction law and complex commercial litigation with a considerable emphasis on construction litigation, construction contracts, green building and mechanic’s lien matters. He is a LEED AP (Leadership in Energy and Environmental Design Accredited Professional) under the U.S. Green Building Council’s Green Building Rating System.

In turn, public entities, including federal, state and municipal governments, have adopted these rating systems in many instances as the basis for providing tax, occupancy and permitting incentives.

For example, the state of Nevada provided tax credits associated with green buildings meeting the specified criteria set forth in its statute. In Austin, Texas, an expedited permitting program was adopted, specifically tied to the LEED rating system, and in Pittsburgh, buildings were allowed to contain 20 percent more height and 20 percent more floor space if they were compliant with the specified green building criteria (which, in that instance was also tied to the LEED rating system).

The need for building structures that are in a greater symbiosis with the surrounding environment is not something isolated solely to domestic locales within the United States, however. There are many international examples that support the continued implementation of green building techniques in construction for many years to come.

As you might imagine, the presence of these incentives has stimulated significant amounts of interest. However, in some instances, because the incentive is tied to a

specific rating system, as opposed to underlying criteria or a standard for energy and otherwise environmentally friendly performance, the focus of certain projects has been more on the need to achieve the necessary credit/rating points in order to satisfy the threshold for enjoyment of the incentive. As a result, sometimes lost in the shuffle is the actual performance of the building and its components.

With the interest in green building being more acute, and with the expectation that the attraction to these buildings will only grow, it is now as important as ever to ensure that the owner, developer, designer, contractor and supplier are all aware of exactly what is being sought and delivered on these projects. As a part of that increased understanding, there also needs to be an open and frank discussion about whether the rating systems currently in widespread use are delivering building performance that would actually make the end product a structure that is environmentally and structurally sound, energy- and water-efficient, and otherwise energy/environmentally responsible.

On a popular cable television channel dedicated to the music industry (VH1), there is a series called “Behind the Music.” This show probes different musical groups and individuals who once enjoyed public success in their musical endeavors. Typically, the program then goes on to expose ripples of emotional and other professional turmoil confronting the group in its rise to stardom and which, in many cases, proved to be the reasons why their success began to wane.

Similar to that entertainment endeavor, it is important for all green building participants, and particularly owners, to get “behind the rating systems” they are considering or currently following. This will allow the owners to make certain they are adequately informed about the criteria for delivery of the green building they are developing. Here, such a probing exercise is not designed to end the use of

the rating system in question. Rather, the goal would be to make certain that all of the entities involved in the design and construction of the project are aware of what actually is being desired by the owner — credit rating achievement, actual building performance, or both.

Indeed, there are many eco-friendly developers that are seeking to build and/or renovate structures that meet some of the criteria identified under the current rating systems available but do not seek the ultimate rating recognition from either the USGBC or the Green Building Initiative. While some have questioned the commitment of some of these developers, it is still important to remember that the actual building's performance should be the ultimate and deciding factor for determining the environmental impact of a given structure. In other instances, where the goal of the owner is a tax incentive or the recognition associated with accomplishing a given rating criteria, obtaining the non-governmental organization rating may be entirely satisfactory, perhaps leaving open the questions of the actual long-term impact, performance and health of the building.

Of course, as with many other technologically unique endeavors, there is always the risk of non-performance. In the context of green building and, in particular, buildings seeking rating recognition, a failure to achieve the given rating requirement may result in the loss of significant tax incentives, tenants or security deposits posted to secure the expedited permitting or additional floor space allowance.

As these projects continue to flourish, but where no rating is ultimately achieved, there is the likelihood that more disputes will arise. Owners, designers, contractors and suppliers will be pitted against each other in a battle over who is responsible for the failure to obtain the necessary credit points and who should be liable for the financial impacts to the project as a result.

Furthermore, it may very well become likely that the verifying documentation for this performance may begin to take on its own independent value, possibly even being viewed as an asset if and when a financial tug-of-war begins over a failed project or an insolvent developer. Because of those and other risks, there must be a frank discussion between the owner and the design and construction teams about

what exactly the project is expected to do, the criteria by which the project's success will be measured, and — in the event success is not achieved — the consequences.

To further mitigate against these risks, there are a myriad of important insurance considerations, along with the possible use of surety bond products to assure project performance consistent with the requirements of the project agreement. At present, that contract documentation has not yet evolved to readily embrace these new risks, challenges and consequences. As such, competent legal counsel, experienced with the issues involved, should also be a part of any project-development planning effort.

---

*With the interest in green building being more acute, and with the expectation that the attraction to these buildings will only grow, it is now as important as ever to ensure that the owner, developer, designer, contractor and supplier are all aware of exactly what is being sought and delivered on these projects.*

---

On many energy generation projects and similar endeavors recently pursued, commissioning, operation and testing periods were established to assess and monitor the overall efficiency of the facilities' performance. Perhaps this is a model for evaluating a green building structure's actual energy use and efficiency. While such an approach may be more suited toward evaluating the energy consumption and efficiency elements of the project, that could just be one of several criteria employed to assess whether the building in question is functioning in the resourceful and

energy-efficient manner that supported the engagement of its design and construction in the first place.

All of the above points may cause owners or developers uncertain about green building to resist or avoid the potential risks associated with these projects. However, they will also fail to tap into the incentives available for these projects and the overall and long-standing benefits these buildings can enjoy. These risks and challenges should not be viewed as obstacles, but rather as opportunities for projects that are truly distinct and genuinely beneficial to not only the owner's bottom line, but also the environment in which the building operates.

As in many other circumstances, the owner is the entity best charged with policing the responsibility of its own building's performance. Possessed with the power of the purse strings, and the methods and manner in which those funds will be distributed, the owner has the ability to demand actual performance if that is the desired goal. The owner also controls the external recognition of the building through the non-governmental organizations which have succeeded in establishing their rating system as "at a glance" expressions of the building's environmentally friendly status. Until these systems are reconciled and reformulated into concise standards that are widely recognized, subject to verification, and collectively embraced by the design and construction communities, owners will need to remain diligent if they want to truly get real energy efficiency now. •