



“Green” Building and Leasing Gains Momentum

by David W. Nunn

Green building and leasing standards are penetrating the real estate market quickly, driven by business and philosophical motivations and spurred on by zoning, tax and building laws and ordinances nationwide. Incentives to build green include tax credits and even low interest loans. Additionally, building profitability can be increased through long-term utility cost savings, increased market value and rental rates, and reputation enhancement to owners, tenants and the like. Companies such as Wal-Mart, McDonalds, Subway, Staples and Best Buy already have taken the initiative in introducing green stores and utilizing green site development techniques.

The most utilized green building certification program today is Leadership in Energy and Environmental Design (LEED). LEED certification is an example of how environmental sustainability policy is entering mainstream commerce in the United States. Introduced in 2000 by the United States Green Building Council (USGBC), the certification process, known as the LEED Green Building Rating System, measures a construction project's use of resources, amount of pollution, environmental degradation and protection of public health. The Rating System assigns points for meeting different standards. Different levels of certification depend on the number of points earned. Different rating systems are used depending on the infrastructure type. In

Offices

Toledo Office:

One Seagate, 24th Floor
P.O. Box 10032
Toledo, Ohio 43699-0032
Telephone: 419-241-6000
Fax: 419-247-1777

Columbus Office:

100 E. Broad Street, Suite 600
Columbus, Ohio 43215
Telephone: 614-280-1770
Fax: 614-280-1777

Findlay Office:

725 S. Main Street
Findlay, Ohio 45840
Telephone: 419-424-5847
Fax: 419-424-9860

Novi Office:

28175 Haggerty Road
Novi, Michigan 48377
Telephone: 248-994-7757
Fax: 248-994-7758

www.eastmansmith.com



total, there are nine different rating systems for both new and existing buildings, including: new construction, existing buildings, operation and maintenance, commercial interiors, core and shell, schools, retail, health care, and homes and neighborhood development.

Each LEED rating system addresses the following six areas: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovative and design process. Weaker areas of a project may be bolstered by acquiring more points in other areas. For instance, a design may lose points for size if a building has a large carbon footprint, but could acquire additional points by using environmentally friendly materials. LEED certification is earned at one of four progressively more challenging levels: Certified, Silver, Gold and Platinum. While LEED certified buildings number in the thousands nationwide, there are still less than 100 LEED Platinum buildings in the United States.

Getting LEED certified requires upfront planning from the start of any construction project. The planning phase includes determining the applicable rating system to be achieved for the project. To help ensure certification, a design professional accredited by the Green Building Certification Institute and designated as a certified LEED accredited professional may be used to assist in planning and design. The project also must be registered with the USGBC. This should be done early in the design phase to achieve an efficient certification.

Once registered, a project manager gains access to LEED online tools, which assist in the managing and certification process. Throughout construction, inquiries can be made regarding how many credits have been accumulated. However, a project manager is not required to submit the complete certification application until the end of the project. The application must include the following:

- the particular rating system for the project,
- all registration information for the project,
- a project narrative providing project highlights (including project drawings and photographs) and
- all applicable fees.

After submission, a checklist is issued depicting the overall accumulation of points, and the requirements for each prerequisite for each rating system. The review process allows for corrections and the submission of additional documentation. Further, the project team may appeal the points awarded after a final review.

Aside from the increasing use of LEED certification in construction projects, green leasing also is coming to the forefront in today's commercial real estate market. The traditional commercial lease is not designed to address the unique concerns of green buildings or sustainable practices. A green lease may add a variety of terms and conditions to ensure the lease incorporates green operating principles and sustainability. For instance, a landlord may require specific energy use procedures to be adopted by a tenant or the tenant to use low VOC paints and carpeting made from recycled materials. More broadly, a landlord may require that a tenant follow designated protocols that are consistent with the building's LEED certification. Conversely, a tenant may use a lease to require a landlord to utilize environmentally preferable construction materials, minimize the creation of solid waste or install energy efficient lighting. Some elements or issues which may arise in a green lease include:

1. Deciding whether a gross or net lease format is most appropriate to provide proper motivation and reward for operating a high-performance building;
2. Deciding what operational procedures and building control/management systems are appropriate for the lease;
3. Identifying what hazardous materials are permissible on the premises and what standards apply for managing those hazardous materials;
4. Determining what materials, procedures, and protocols are applicable for cleaning the building in a non-toxic and sustainable manner;
5. Developing building-wide recycling programs applicable to the landlord and tenant;
6. Deciding what sustainable product requirements and construction practices shall be required of the landlord and tenant for new construction or remodeling projects;
7. Developing a tenant manual and guide to explain the building's procedures and operating parameters required to meet established sustainable goals and objectives; and
8. Developing audit rights and enforcement provisions in the lease to ensure compliance with green provisions

While a number of organizations such as the American Institute of Architects and the Building Owners and Managers Association are beginning to make available standard form green construction and lease contracts, the uniqueness of each green construction project and lease transaction means that “one size does not fit all,” and more carefully tailored contract drafting generally is required. Business, technical and legal representatives need to be involved upfront in identifying the goals and objectives of the parties before green standards are finalized, and responsibilities and risks are contractually allocated. Failure to adequately define expectations, standards and roles in a green project may result in designers, architects, engineers, contractors and lawyers facing complaints under theories of fraud, misrepresentation, negligence, breach of contract and breach of warranty. However, when green projects are well planned, structured and implemented, they can offer significant environmental, business and profit advantages to savvy real estate professionals.



Mr. Nunn is a member of the Firm. His practice encompasses a number of environmental issues including CERCLA, brownfield redevelopment and transactional due diligence. Mr. Nunn can be contacted at our Toledo office (419-241-6000).

Andrew L. Smith, law clerk, contributed to this article. He is a third year law student at the University of Cincinnati.

Disclaimer

The articles in this newsletter have been prepared by Eastman & Smith Ltd. for informational purposes only and should not be considered legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney/client relationship.

Copyright 2009