

The background features a stylized illustration of several skyscrapers with blue-tinted windows. In the foreground, there are several green tree icons with white outlines, some of which are partially obscured by a semi-transparent grey box containing text. The trees vary in size and are scattered across the bottom half of the image.

HOW GREEN IS YOUR BUILDING: NAVIGATING CERTIFICATION & PROCUREMENT CHALLENGES

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Presentation Overview

- *Green Building Projects :: Sources of Risk*
- *Green Building Policy:: Legal Issues in Legislation*
- *Third-Party Rating Systems: Proxies for Performance?*
- *National Institute for Building Sciences Report*
- *Reported Green Building Litigation*



Green Building Projects :: Sources of Risk

- ***Financial***
 - Costs of third-party certification
 - Risks of delay
 - Risks of failure to obtain incentives
 - Surety ability/willingness to underwrite green projects
- ***Standards of Care / Legal***
 - Failure to earn anticipated level of third-party certification
 - More aggressive design increasing chances for claims
 - Attractive nuisances (i.e. green roofs)
 - Unclearly allocated responsibilities
 - Consultants and contractors taking on professional responsibilities without procuring appropriate insurance



Green Building Projects :: Sources of Risk

- ***Building Performance***
 - Use of untested materials
 - Relationship between designer and commissioning agent
 - Certification as proxy for performance
- ***Subcontractors / Consultants***
 - Inadequate training and expertise
 - Identifying replacements
- ***Green Building Regulations***
 - State- and local-level regulations adopting third-party certification regimes that are constantly changing
 - Mandates forcing owners to demand equivalent of warranties or guarantees from design team



Green Building Projects :: Sources of Risk*

Chicago	Washington, D.C.	San Francisco	New York City
Financial	Financial	Financial	Performance
Performance	Education	<u>Regulatory</u>	Standard of Care/Legal
Standard of Care/Legal	Contractors & Consultants	Performance	Contractors & Consultants
Supply Chain	ROI	Education	Technology
<u>Regulatory</u>	Technology	ROI	ROI

* Green Building: *Assessing the Risks, Feedback from the Construction Industry* (Marsh, July 2009)



Green Building Policy :: Legal Issues in Legislation

- *Non-Delegation Doctrine*
 - Municipality “hereby adopts, in principle, the U.S. Green Building Council's (USGBC) Leadership in Energy and Environmental Design for New Construction Rating System, Version 2.2. and, further, automatically adopts any future versions promulgated by the USGBC.”
- *Void for Vagueness*
- *Preemption*
- *Antitrust*



Green Building Policy :: Legal Issues in Legislation

- *Is LEED-driven legislation excluding FSC products from the marketplace?*
 - *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988)
 - *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961)
- *“Private standard-setting organizations have been traditional objects of antitrust scrutiny.”*

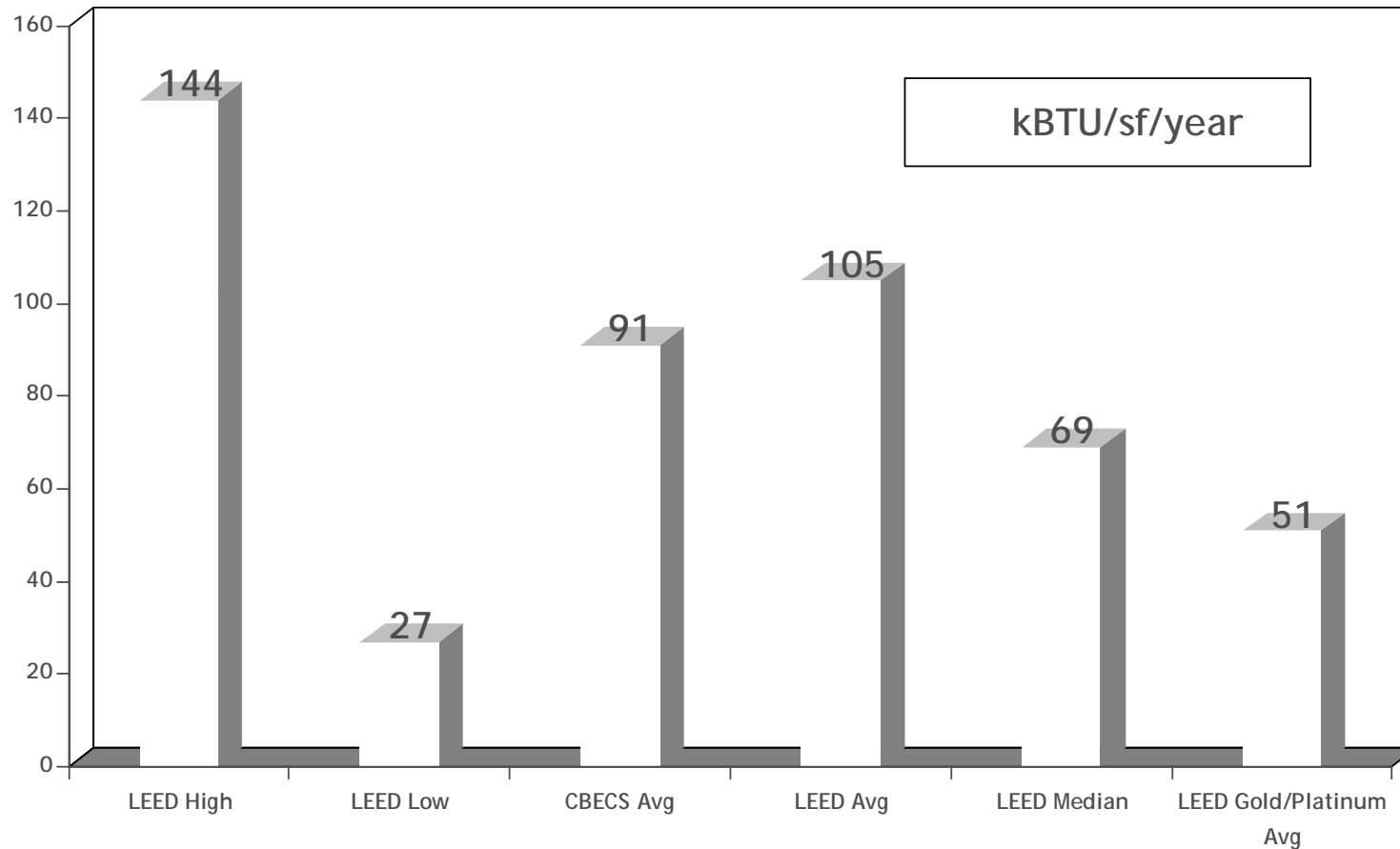


Third-Party Rating Systems :: Proxies for Performance?

- *Energy Performance of LEED-NC Buildings - NBI Executive Summary - 3/4/08*
 - “The results show that projects certified by the USGBC LEED program average **substantial** energy performance improvement over non-LEED building stock.”
 - “For all 121 LEED buildings, the MEDIAN measured energy use intensity was . . . 24 percent better than the CBECS national AVERAGE for all commercial building stock.”



Third-Party Rating Systems :: Proxies for Performance?



Source: Energy Performance of LEED for New Construction Buildings

New Buildings Institute, March 4, 2008



Third-Party Rating Systems :: Proxies for Performance?



- *ImaginOn Library Building - Charlotte, North Carolina*
 - Designed to use 30 percent less energy than ASHRAE 90.1-1999 standard, but recent study shows library actually uses double that amount.
 - Spokesperson: it was “a reflection of our faith in the LEED certification process that we didn’t second-guess.”



NIBS Report: September 2009

- *National Institute for Building Sciences Task Group: Report on Building Rating and Certification in the U.S. Building Community*
 - “There is very limited data that correlates verifiable improvements in building performance with building rating/certification system requirements. Many people view the few data sets that do exist as controversial in terms of methodologies and conclusions drawn from them.”
 - “There are growing concerns that the implied guarantee of building energy performance emanating from building rating/certification/labeling systems may confuse or mislead policy makers and the public.”
 - “Elected officials and policy makers at the federal, state, and local levels only rarely understand the objectives, development, intended uses, opportunities, and limitations of rating/certification programs for buildings and accreditation programs for individuals.”
 - “At an increasing rate, state and local governments and their code/regulatory agencies are adopting building rating / certification systems, intended as voluntary systems, to be their code or regulatory requirements, often without fully understanding their benefits, tradeoffs, and costs.”



Reported Green Building Litigation

- *Shaw Development v. Southern Builders*, Case No. 19-C-07 11405, (Somerset Co. Cir. Ct., Feb 7, 2007)
- *AHRI v. City of Albuquerque*, 2008 U.S. Dist. LEXIS 42135 (Oct. 8, 2008)
- *BIAW v. Washington Code Council* (W.D. Wash., May 25, 2010).
- *Gidumal v. Site 16/17 Development LLC et al.*, N.Y. County Index No. 105958/10 (May 5, 2010).



Avoiding *Gidumal* :: Project Marketing





Avoiding *Gidumal* :: Project Marketing





LEED 2009 Decertification :: GBCI Certification Challenge Policy

- *LEED 2009 Minimum Program Requirements*
 - “The Green Building Certification Institute (“GBCI”) reserves the right to revoke LEED certification from any LEED 2009 project upon gaining knowledge of non-compliance with any applicable MPRs. If such a circumstance occurs, any registration or certification fees paid by the project team to GBCI will not be refunded.”
- *Northland Pines High School Certification Challenge*



Recap & Conclusions

- Green building presents opportunities, but also some non-traditional legal risks; there is a new vocabulary for green building that remains in a constant state of flux.
- Current legislation differs widely by jurisdiction and continues to be enacted with heightened frequency; accordingly, translating regulatory requirements into contract documents will remain an important challenge.
- Accuracy in project marketing materials, construction contracts, and other green building project materials is paramount.
- Until stakeholders become intimately familiar with programs like LEED, heightened due diligence and transactional risk management will be paramount.
- Claims and lawsuits to date suggest that greater good will not prevent parties from filing lawsuits.



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