
LEED CERTIFICATION, PROPERTY TAXES, AND LAND USE: SOME RECENT DEVELOPMENTS

STEPHEN T. DEL PERCIO

Arent Fox LLP

Over the past decade, “green building” concepts have moved from the frontiers toward the mainstream of building design and construction. Designed and marketed by the U.S. Green Building Council (USGBC), the LEED (Leadership in Energy and Environmental Design) green building rating system has become North America’s de facto third-party assessment tool of a building’s environmental impact. LEED ratings range from Certified to Silver then Gold and peak at Platinum.

Forty-five states, 442 localities, and 14 federal agencies and departments have incorporated LEED into legislation of various types, from tax credits and other financial incentives to certification mandates. Last November, USGBC announced that the total square footage of LEED-certified buildings had reached 1 billion globally, with an addition 6 billion square feet registered for certification.¹

As the movement’s grip on the real estate industry strengthens, commentators across the country have focused more and more on the legal risks arising out of green building. One corner of the law where the green building legal spotlight has yet to shine with much vigor is zoning and land use. But three legal opinions written to date in 2011, including one from the Oregon Tax Court, suggest that green building and—more particularly—LEED certification are beginning to intersect those areas in a significant fashion.

¹ LEED Certified green building projects reach one billion square feet (2010). *Buildings*, available at <http://www.buildings.com/ArticleDetails/tabid/3321/ArticleID/11044/Default.aspx>, retrieved August 11, 2010.

LEED CERTIFICATION MAY LEAD TO HIGHER PROPERTY VALUES AND HIGHER PROPERTY TAXES

Proponents of green building concepts argue that increased lease rates, lower operating costs, and, in turn, increased property values can overcome the higher design and construction costs associated with LEED certified construction. A recent Oregon Tax Court opinion is the first reported decision in which a property's pursuit of LEED certification and supporting green design features were used to buttress an argument that those features made real property worth more.²

Touted as the only privately funded LEED Silver-certified space anywhere in the State of Oregon, the 6-story, mixed-use Elements Building in downtown Corvallis, Oregon recently found its green design features and LEED certification status as major themes in a written Oregon Tax Court opinion.

In the proceeding, the recent purchaser and owner of the building challenged its assessed market value for property tax purposes. Although the building had lost tenants during the economic downturn, only one office floor was vacant at the time Benton County assessed the disputed valuation. But that tenant was Hewlett Packard. So the owner's property tax appraiser made an economic obsolescence adjustment (dropping the building's value, and corresponding property tax burden, by 52 percent) which the county assessor disputed.

In claiming that the building's green features made it more valuable, the county assessor testified that "the subject property was substantially progressed in the process to LEED Silver certification prior to completion of the project, however there is no evidence that the structure has been officially certified." He also identified the building's "green roof, efficient energy systems, and re-used materials throughout," and argued that "those features add value through efficient ventilation and heating and energy savings." In arguing for the lower valuation the owner simply claimed that the building "will never be [LEED] certified at any level."

It is also worth noting that the logic applied by a New York appellate court in 2009 was somewhat similar to the county assessor's argument that the Elements Building's green features made it inherently more valuable than a non-green building. In the New York case, the court required a construction lender to continue funding a developer's construction loan on the basis that the project's federal green bond financing was "revolutionary" and "unique."³

The *CLP Elements* opinion is important not for the result (the court held in favor of the county) but because it is the first reported judicial decision in which a property's pursuit of LEED certification and supporting green design features were used to advance an argument that those features make real property worth more. Al-

² *CLP Elements LLC v. Benton County Assessor*, TC-MD 100662D, May 10, 2011.

³ *Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp.*, 889 N.Y.S.2d 793 (App. Div., 4th Dep't 2009).

though numerous studies have made the argument that green design features and LEED certification translate into higher asset values, they have been widely critiqued on the basis that many LEED-certified buildings have traded hands during the biggest real estate boom in modern history.⁴ Thus, it has been argued that the higher prices may have been associated with the boom, rather than LEED design and building concepts. Regardless, *CLP Elements* suggests that courts will soon confront green building valuation arguments more frequently. In doing so, they should take a critical and objective view of the financial benefits of a property's green features and pursuit of LEED certification.

LEED CERTIFICATION AND CITY ZONING: MIXED MESSAGES

Green building has also intersected land use and zoning issues outside of the property tax arena. For example, the Superior Court of Connecticut recently denied an appeal from a decision of New Haven's zoning board that authorized a zoning amendment.⁵ The amendment created a Planned Development District for the Yale School of Management's new Norman Foster-designed campus. The amendment has allowed Yale to proceed with the construction of a 230,000-square-foot, LEED Gold-hopeful building that is the centerpiece of the development. In analyzing the project's proposed green features, the court held that "[t]here would appear to be sufficient compliance with the environmental concerns of the Comprehensive Plan" and went on to uphold the zoning amendment in Yale's favor.

In another decision issued earlier this year, but across the border in Toronto, the Ontario Municipal Board rejected claims that a LEED project deserved a zoning variance to Toronto's Official Plan and the Ontario Planning Act on the basis that it promoted environmental sustainability in the spirit of the legislation.⁶ Specifically, the Board considered arguments from the applicants that the "modernist" design for their proposed 3-story home at 7 Ashwood Crescent—for which they intended to seek LEED certification and would replace an existing bungalow—qualified for the variance on the basis that its proposed green features and third-party certification constituted "extenuating circumstances." The Board held that

[t]here is simply no statutory authority for [third-party environmental certification labels] to sidestep land use planning requirements ... "Certification by a private third party" is no substitute for a transparent and legally mandated public process, and no guarantee of good planning.

⁴ Del Percio, S. T. (2008). Head of Green Building Finance Consortium offers critique of recent CoStar study, *gbNYC*, available at <http://www.greenbuildingsnyc.com/2008/06/09/head-of-green-building-finance-consortium-offers-critique-of-recent-costar-study/>, retrieved August 12, 2011.

⁵ *Tagliarini v. New Haven Board of Aldermen et al.*, 2011 WL 1288638 (Conn. Super., March 11, 2011).

⁶ *In the Matter of Penelope McIver*, Ontario Municipal Board Case No. PL 100661 (Jan. 17, 2011).

Although these two decisions did not create any new precedential pieces of law, they do demonstrate that green building principles and LEED certification can—and will—play a major role in 21st century zoning and land use planning. Understanding the purposes and limitations of green design features and third-party certification systems like LEED will continue to be of critical import in the legal context not only for practitioners, but project teams and government officials as well. ■

Stephen T. Del Percio is an attorney in the construction and real estate group at Arent Fox LLP. He was one of the first ten attorneys in the U.S. to earn the LEED AP designation from U.S. Green Building Council. Mr. Del Percio is a frequent lecturer and author on the legal issues associated with green building, leasing, and policy issues.