

# The Wisdom of LEED's Role in Green Building Mandates

by Marya N. Cotten

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## Introduction

“Climate change” is an extremely understated way to describe humans increasingly suffering from extreme weather events like intense and frequent hurricanes, food shortages for millions of people, and a spike in diseases like malaria and cholera.<sup>1</sup> The pressing need to reduce carbon dioxide and other greenhouse gases to prevent-- or at least mitigate or slow-- the inexorable effects of climate change has increased dramatically the recent attention of regulators on “green building” in the U.S. As Europe has placed a price on carbon, with the rest of the developed world likely to follow with restrictions or their own markets in coming years, the focus has been on domestic measures that could have a measurable impact on greenhouse gas emissions like green building.

According to the U.S. Environmental Protection Agency (EPA), buildings in the U.S. account for 39% of total energy use, 12% of the total water consumption, 68% of total electricity consumption, and 38% of carbon dioxide emissions.<sup>2</sup> This statistic evidences the magnitude of the environmental impact of buildings as well as the environmental gains that may be achieved from green buildings versus traditional building stock.<sup>3</sup> According to the EPA, green buildings can have tremendous benefits: environmental (*e.g.*, improved air and water quality, reduced carbon emissions and waste, protection of biodiversity, and conservation of resources), economic (*e.g.*, reduced operating costs, improved worker productivity, optimized life-cycle economic performance and the expansion of the green products market) and social benefits (*e.g.*, improved occupant health and well-being, reduced demand on infrastructure, and improved aesthetics and quality of life).<sup>4</sup> With these benefits, the resulting demand and development of green buildings has increased dramatically in the last twenty years.<sup>5</sup>

The Leadership in Energy and Environmental Design (LEED) Green Building Rating System™ is the prevailing third-party certification program, which establishes benchmarks for the design, construction and operation of “green buildings”.<sup>6</sup> The LEED system is predicated on the human health and environmental standards of sustainable site development, reduction in potable water use, energy efficiency, selection of environmentally

<sup>1</sup> See, *e.g.*, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007), <http://www.ipcc-wg2.org/index.html> (last visited August 31, 2011)

<sup>2</sup> *Why Build Green*, <http://www.epa.gov/greenbuilding/pubs/whybuild.htm> (last visited August 31, 2011)

<sup>3</sup> For more statistics on buildings and their impact on the environment, see *Buildings and their Impact on the Environment: A Statistical Summary* (April 22, 2009) at <http://www.epa.gov/greenbuilding/pubs/gbstats.pdf> (last visited August 31, 2011) [hereinafter, EPA, *Why Build Green*]

<sup>4</sup> EPA, *Why Build Green*, *supra*, note 2. For information on human experience and productivity in green building, see Norm G. Miller et al., *Green Buildings and Productivity*, 1 JOURNAL OF SUSTAINABLE REAL ESTATE 1 (2009), <http://www.costar.com/josre/JournalPdfs/04-Green-Buildings-Productivity.pdf> (last visited August 31, 2011) [hereinafter *Miller*] and see also Chris Pyke et al., *Green Building & Human Experience, Testing Green Building Strategies with Volunteered Geographic Data* (June 10, 2010) <http://www.usgbc.org/ShowFile.aspx?DocumentID=7383> (last visited November 17, 2010)

<sup>5</sup> For a brief overview of historical green building in the U.S., see BUILDING DESIGN AND CONSTRUCTION, WHITE PAPER ON SUSTAINABILITY (November 2003) at <http://www.usgbc.org/Docs/Resources/BDCWhitePaperR2.pdf> (last visited August 31, 2011)

<sup>6</sup> The U.S. Environmental Protection Agency defines “green building” as follows: “Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building’s life-cycle from siting to design, construction, operation, maintenance, renovation and deconstruction. This practice expands and complements the classical building design concerns of economy, utility, durability, and comfort. Green building is also known as a sustainable or high performance building.” *Basic Information, Green Building*, <http://www.epa.gov/greenbuilding/pubs/about.htm> (last visited August 31, 2011)

preferred materials, and indoor air and environmental quality.<sup>7</sup> There are also credits given for innovation in design and components that address regional environmental concerns.<sup>8</sup>

With the rise of green building, LEED has gained tremendous momentum in the real estate industry with incredible market recognition world-wide as an eco-label, a certification of an environmentally-preferred option by an independent third-party organization.<sup>9</sup> As of November 2009, there were 3,858 LEED-certified commercial projects, with another 25,608 registered with the USGBC as a project under development attempting to achieve certification, and 3,050 certified residential projects with another 19,063 registered.<sup>10</sup> However, despite the USGBC's stated mission of market transformation, the current market transformation is not solely market-driven by the real estate industry and its consumers; it is being propelled by policies created by various levels of government in the United States --federal, state and local -- as well as by international governments and non-governmental development organizations. The green building movement has been accelerated by government incentives ranging from financial incentives like tax incentives, rebates, loans, grants, and fee reductions to other types of incentives like expedited permitting and bonus density.

The real estate industry has embraced LEED as a way to show sensitivity to the environment and fulfill a market demand for environmentally-sound building stock, to take advantage of government incentives, and as a source of market differentiation. For example, there is now competition in the real estate industry over which level of LEED certification is achieved for a new project. While there are varying reports on the incremental costs associated with pursuing a LEED-certified building, the usual range cited is an increase of 1-8% to construction and soft costs depending on the level of certification pursued and how early the planning starts in terms of pursuing LEED certification.<sup>11</sup> However, the increased costs must be evaluated in the lower costs of operating the buildings, primarily savings in electricity costs, and also the premium associated in sales or rentals of green buildings. The incremental costs of green buildings and the resulting premiums captured in sales prices or rental rates is a highly debated topic. Several reports have placed the rental premium at 3-6% and typically 8-10% higher occupancy rates.<sup>12</sup>

Furthermore, in addition to market differentiation and demand, LEED has morphed into a de facto requirement for the real estate industry due to attractive governmental incentives or as a requirement for financing.<sup>13</sup> In other cases, despite having started as a voluntary certification process for developers or building owners independent of any governmental requirements, LEED has effectively become a legal requirement. Various governmental bodies are binding themselves to LEED standards by passing green building legislation covering public and private development as well as requiring LEED certified buildings by incorporating the substantive components of LEED or LEED certification into building codes, zoning, and the public request for proposal (RFP) process.<sup>14</sup>

<sup>7</sup> *What LEED Measures*, <https://www.usgbc.org/DisplayPage.aspx?CMSPageID=1989> (last visited August 31, 2011)

<sup>8</sup> *Id.*

<sup>9</sup> As of the time of writing, the current LEED rating systems are: New Construction, Core & Shell, Commercial Interiors, Homes, Schools, Healthcare, Retail, Neighborhood Development, and Existing Buildings: Operation & Maintenance. See *LEED Rating Systems*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222> (last visited August 31, 2011)

<sup>10</sup> As of November 2009, there were also over 20,000 members of the USGBC and 133,489 LEED Accredited Professionals. See USGBC Newsletter (November 2009), <https://www.usgbc.org/ShowFile.aspx?DocumentID=6945> (last visited August 31, 2011) It is worth noting that registration of a project does not necessarily mean a resulting certification.

<sup>11</sup> Norm Miller, *Does Green Still Pay Off?* <http://www.costar.com/josre/pdfs/DoesGreenStillPayOff.pdf> (last visited August 31, 2011); See also Davis Langdon, *The Cost of Green Revisited* (July 2007) <http://www.davislangdon.com/upload/images/publications/USA/The%20Cost%20of%20Green%20Revisited.pdf> (last visited August 31, 2011); See also Steven Winter Associates, Inc., GSA LEED Cost Study Final Report (October 2004), <http://www.wbdg.org/ccb/GSAMAN/gsaleed.pdf> (last visited August 31, 2011)

<sup>12</sup> *Id.* See also *Addressing "the Green Building Premium"*, <http://www.usgbc.org/ShowFile.aspx?DocumentID=7189> (last visited August 31, 2011)

<sup>13</sup> See, e.g., *the International Finance Corporation, Procurement*, [http://www.ifc.org/ifcext/footprint.nsf/Content/Environment\\_Procurement](http://www.ifc.org/ifcext/footprint.nsf/Content/Environment_Procurement) (last visited August 31, 2011). For an overview of the types of incentives available, see The American Institute of Architects, *Local Leaders in Sustainability, Green Incentives*, <http://www.aia.org/aiaucmp/groups/aia/documents/pdf/aia076942.pdf> (last visited August 31, 2011) [hereinafter *AIA Report*]

<sup>14</sup> *LEED Public Policies*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779> (then follow hyperlink "See the full list") (last visited August 31, 2011). While there are many regulations which contain independent standards, this paper will focus specifically on the regulatory

Part I of this paper describes the evolution of LEED from an eco-label to a legal mandate by various levels of government. It will examine the array of governmental activity in the area of green building, focused specifically on LEED-related standards, and the transition of green building from a type of “soft law” to binding regulation. Part II examines whether the incorporation of LEED standards into government regulations is a form of private ordering or co-regulation and the benefits and critiques of this trend. Part III sets forth recommendations and concluding observations on the scope, implications and wisdom of the trend by various levels of government to use LEED as a legally binding standard without proper regard for its respective role in implementation or oversight.

## LEED’s Evolution: from Eco-Label to Law

An eco-label is the labeling of a product to signify to consumers that it is an environmentally-preferred alternative to other products in its class. Eco-labels can emanate from private organizations, typically nonprofit organizations, or from governments. The labels are designed to be a shortcut to inform consumers quickly and simply with a label which represents information about the product’s attributes and provides a source of market differentiation. Examples of well-known eco-labels from non-governmental organizations include the Forest Stewardship Council’s FSC-certified wood<sup>15</sup> and “Fair Trade”-certified<sup>16</sup> agricultural products like coffee and tea. Well-known U.S. governmental certifications are USDA Organic<sup>17</sup>, administered by the Department of Agriculture, and Energy Star<sup>18</sup>, a joint program by the Environmental Protection Agency and the Department of Energy. Other countries have their own certification systems. The European Union has its own EU Ecolabel, which it administers throughout a variety of product classes.<sup>19</sup>

One report estimates that there are over 300 eco-labels and more are being developed all the time.<sup>20</sup> The utility and strength of these eco-labels varies greatly. First of all, there are eco-labels designed to evaluate a product based on a single attribute; for example, how the Energy Star eco-label rates energy efficiency. There can also be eco-labels which rate a variety of factors which are inherently more complex. This is because multiple factors often contain internal conflicts or trade-offs. For example, in the LEED rating system there are points given for the use of daylighting (using natural lighting to reduce lighting needs during the day), which studies have shown helps increase human happiness and productivity. However, more windows can also result in energy inefficiency by reducing the effectiveness of heating and cooling systems which may result in a reduction of other points.<sup>21</sup>

LEED is a multiple-attribute eco-label signifying that it is an environmentally preferred alternative to other buildings built without concern for the environment. Over time, the process of LEED certification has evolved. Initially, the U.S. Green Building Council (USGBC), a nonprofit organization, from its inception in 1993, created the standards as well as issued the certifications to projects. It issued its first LEED 1.0 pilot program in 1998.<sup>22</sup> As of April 2009, with the launch of LEED v3, the USGBC remains the policy-setting body which creates the building rating systems, but the certification of LEED professionals, those

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use of LEED as a standard either by incorporating the substantive standards directly into the regulation or by reference and requiring LEED certification as a prerequisite for regulatory compliance.

<sup>15</sup> FSC Certification, <http://www.fsc.org/certification.html> (last visited August 31, 2011)

<sup>16</sup> What is Fair Trade, [http://www.fairtrade.net/what\\_is\\_fairtrade.html](http://www.fairtrade.net/what_is_fairtrade.html) (last visited August 31, 2011)

<sup>17</sup> National Organic Program, <http://www.ams.usda.gov/AMSv1.0/nop> (last visited August 31, 2011)

<sup>18</sup> How a Product Earns an Energy Star Label, [http://www.energystar.gov/index.cfm?c=products.pr\\_how\\_earn](http://www.energystar.gov/index.cfm?c=products.pr_how_earn) (last visited August 31, 2011)

<sup>19</sup> What is the Ecolabel?, [http://ec.europa.eu/environment/ecolabel/about\\_ecolabel/what\\_is\\_ecolabel\\_en.htm](http://ec.europa.eu/environment/ecolabel/about_ecolabel/what_is_ecolabel_en.htm) (last visited August 31, 2011)

<sup>20</sup> For survey results regarding the certification process and performance of international ecolabels, see World Resources Institute, *Global Ecolabel Monitor* (2010), [http://pdf.wri.org/2010\\_global\\_ecolabel\\_monitor.pdf](http://pdf.wri.org/2010_global_ecolabel_monitor.pdf) (last visited August 31, 2011)

<sup>21</sup> E.g., see LEED 2009 for New Construction, Prerequisite 2 for Energy & Atmosphere (Minimum Energy Performance) and Credit 8.2 Daylight and Views for Indoor Environmental Quality (Daylight).

<sup>22</sup> *Green Building, Basic Information*, <http://www.epa.gov/greenbuilding/pubs/about.htm#1> (last visited August 31, 2011)

trained in the LEED certification process and the benchmarks required for certification of a project, is now granted by the Green Building Certification Institute (GBCI), a nonprofit organization created in 2007.<sup>23</sup>

This bifurcation was intended as a way to strengthen the certification process by isolating the standard-setting body from the license-issuing body. GBCI hires third-party certifiers that will produce auditable third-party certifications which are compliant with the standards created by the International Standardization Organization (ISO).<sup>24</sup> ISO is an internationally recognized non-governmental organization that serves as a standards-setting body comprised of members from standards-setting organizations from 163 countries.<sup>25</sup> The review and certification system leads to a stronger brand and more valuable eco-label.

Some eco-labels are not dependent on a review of the product, an audit or independent certification. This can lead to a weaker, less meaningful label, as does a spotty, inefficient or unchallenging review process. There has been recent criticism of some of these failures in the media; for example, a recent audit of some of the manufacturers participating in the Energy Star program found that some manufacturers who had self-certified their products as Energy Star had failed to actually meet the requirements for Energy Star certification.<sup>26</sup> In 2009, the *Washington Post* ran a series of articles criticizing the U.S. Department of Agriculture's National Organic Program by revealing non-existent, sporadic, or unsatisfactory audits of farms that had been granted permission to use "USDA Organic" based on compliance to certain organic standards.<sup>27</sup> An eco-label is only as useful and strong as the standard-setting and verification process. The ISO-compliant LEED v3 is an attempt to strengthen the LEED eco-label by adding a more rigorous review process to a label with existing market visibility and brand recognition. This should help protect the brand and fuel even more market demand.

## Spectrum of Governmental Activity

The recognition of the market demand for green buildings by real estate developers created a voluntary movement and creation of the green building industry. Recognizing the environmental benefits of green buildings, various levels of government began to explore a variety of ways to encourage and increase green building and increase overall sustainability. This governmental activity ranges from encouragement and incentives to, increasingly, mandatory standards regulating the building industry.<sup>28</sup>

In some ways, this transition from LEED as an eco-label and source of incentives to a regulatory requirement is similar to the process of aspirational "soft law" hardening into binding "hard law". A soft law is a quasi-regulatory action by a government or governments that state intentions of the participants or create normative goals but generally lack enforcement mechanisms. Soft law merely gives birth to "goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations."<sup>29</sup> This is very prevalent in environmental law, especially international environmental law.<sup>30</sup> A recent example of soft law in this area is the "Copenhagen Accord" that emerged from the 15<sup>th</sup> Conference of the Parties (COP 15) to the United Nations

<sup>23</sup> *LEED Version 3*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1970> (last visited August 31, 2011)

<sup>24</sup> *Id.*

<sup>25</sup> *re About ISO*, <http://www.iso.org/iso/about> (last visited August 31, 2011). It also complies with ANSI/ISO/IEC 17024 with respect to certifying LEED professionals. For a description of why this is important, see *Why ISO/IEC 17024?*, <http://www.iitac.org/welcome/overview/> (last visited August 31, 2011)

<sup>26</sup> *LG Compensates Consumers, Modifies Fridges Over Energy Star Snafu*, TWICE, December 1, 2008, [http://www.twice.com/article/239527-LG\\_Compensates\\_Consumers\\_Modifies\\_Fridges\\_Over\\_Energy\\_Star\\_Snafu.php?rssid=20321](http://www.twice.com/article/239527-LG_Compensates_Consumers_Modifies_Fridges_Over_Energy_Star_Snafu.php?rssid=20321) (last visited August 31, 2011)

<sup>27</sup> *Purity of Federal "Organic" Label is Questioned*, THE WASHINGTON POST, July 3, 2009.

<sup>28</sup> See Shari Shapiro, *Who Should Regulate? Federalism and Conflict in Regulation of Green Buildings*, 34 WM. & MARY ENTL. L. & POLICY REV. 257 at 260-265 [hereinafter *Shapiro*]. She identifies 4 forms of green building regulation: government construction regulation like building codes, mandatory green building regulations, financial incentives and non-financial incentives.

<sup>29</sup> Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420,428 (1991) [hereinafter *Dupuy*].

<sup>30</sup> See, e.g., Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 A.J.I.L. 259 (1992).

Framework Convention on Climate Change held in Copenhagen, Norway in December 2009. It is only considered to be “noted by” the 15<sup>th</sup> Session of the COP, because it was not signed by all countries.<sup>31</sup> A traditional critique of soft law includes limited usefulness due to its non-binding nature or absence of meaningful enforcement mechanisms, and because it is viewed as too idealistic.<sup>32</sup> However, proponents of soft law argue it is a starting point when political or economic barriers prevent regulation, and can serve as an aspirational basis for changing behavior and creating norms, which may result in the passage of enforceable regulation.<sup>33</sup>

This is descriptive of the green building trend, specifically with respect to LEED; the green building movement began as an aspirational movement fueled by government encouragement and incentives and has moved increasingly from a non-binding encouraged norm to a legal requirement.

## Encouragement

Encouragement describes a variety of ways that a governmental body can provide support to further green building that fall short of a legal requirement or traditional financial incentives like tax abatements. Encouragement includes recognition of achievement, the RFP process, technical assistance, trainings and leasing assistance. Recognition is a form of public acclaim. For example, a mayor may appear at the ribbon-cutting ceremony and bestow an award for a new building or renovation that has achieved a high level of certification or innovation in environmentally-preferred design.<sup>34</sup> The request for proposal (RFP) process by which companies bid on government projects can also encourage green building by requiring it as a component of the design requested, or by giving preference or points to proposals which incorporate green building principles.<sup>35</sup> The government can also provide technical and design trainings or assistance, and leasing assistance for energy efficient equipment which can be bought by the government in bulk more cost efficiently.<sup>36</sup>

Another way the government encourages green building is by serving as a model by creating regulations to require green building for government entities or by administrative policy-setting favoring green building.<sup>37</sup> As of January 21, 2011, the USGBC reports that government owned or occupied LEED buildings make up 28% of all LEED projects: the federal government has 369 certified projects and another 3665 pursuing certification; state governments have 558 certified projects and 1995 pursuing certification; and local governments have 829 certified projects and 3156 pursuing certification.<sup>38</sup>

## Incentives

The most common government incentives for green building are financial ones: tax credits or deductions, loans or grants, and fee reductions or rebates. Tax credits or tax abatements are strong incentives for green building precisely because it represents direct cost savings and can help offset some of the increased design and administrative costs associated with green building.<sup>39</sup> There are various forms of taxes that can be the basis for

<sup>31</sup> *Copenhagen Accord*, <http://unfccc.int/home/items/5262.php> (last visited August 31, 2011)

<sup>32</sup> Find cite

<sup>33</sup> See, e.g., Dupuy, *supra*, note 29.

<sup>34</sup> E.g., *The Fortune Society Celebrates the Grand Opening of Castle Gardens*, STATES NEWS SERVICE, September 15, 2010 (article describing Mayor Michael R. Bloomberg at ribbon-cutting for new LEED certified project in the West Harlem neighborhood in New York, NY)

<sup>35</sup> *GSA moves to LEED Gold for All New Federal Buildings and Major Renovations* (October 28, 2010), <http://www.gsa.gov/portal/content/197325> (last visited August 31, 2011)

<sup>36</sup> AIA Report, *supra*, note 13, at 14, 16.

<sup>37</sup> *Government Resources*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779> (last visited August 31, 2011)

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., Miller, *supra*, note 4 (regarding the incremental costs and premium associated with a “green building” versus a traditional construction).

this type of incentive: corporate tax, gross receipts tax, income tax, property tax, sales tax and local tax.<sup>40</sup> For example, Cincinnati, Ohio has a 100% city tax exemption for LEED certified buildings, not to exceed \$500,000 over 15 years for new buildings or over 10 years for major renovations. If buildings achieve LEED Platinum certification there is no maximum exemption.<sup>41</sup>

In addition, the government can provide sources of financing with grants or loans, which can provide a tremendous incentive for green building, especially in times of a real estate down turn or credit constriction. Grants are typically a one-time payment to subsidize the costs of LEED certification, or can be grants that help subsidize certain features like photovoltaic energy or more efficient water systems.<sup>42</sup> For example, in King County, Washington, there are grants awarded for LEED projects in King County (but outside Seattle city limits) ranging from \$15,000-\$25,000 depending on the level of LEED certification.<sup>43</sup>

Other valuable non-financial incentives are bonus density and expedited permitting. For example, the City of Seattle has an ordinance which provides for bonus density for projects that achieve LEED Silver Certification and contain an affordable housing component.<sup>44</sup> Among many other cities, the City of Santa Monica, California grants priority permit review for buildings registered to achieve to LEED certification.<sup>45</sup>

## Regulation

While the initial governmental push for green building started largely with encouragement and incentives, the more recent trend is for local and state governments to require green building, often by requiring LEED certification or evidencing the ability to achieve LEED certification if an application were submitted.<sup>46</sup> Also, while there has not been significant federal legislation specifically mandating green building federally, as of January 2011, fourteen federal agencies have adopted LEED standards for their operations. At a state and city level, the movement towards binding regulation largely started with the applicable governmental entity being bound to green building regulations. A few jurisdictions then passed or extended legislation to cover private development, typically over a certain size. This legislation varies in terms of its actual content with respect to LEED.<sup>47</sup> In some jurisdictions, LEED is one of several compliance options, sometimes including a standard generated by the governmental authority. In others, a certain level of LEED certification is required for compliance. In still others, the substantive standards of LEED are incorporated (either by reference or importing the substance of the standards into the regulation, zoning or building codes). In this type of jurisdiction, one must evidence compliance with the standards but actually receiving certification is not necessary. This paper will focus on the general idea of LEED, a non-governmental certification, as a standard for legal compliance regardless of how exactly that requirement is administered.

<sup>40</sup> AIA Report, *supra*, note 13, at 6.

<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 12.

<sup>43</sup> *Commercial Green Building Incentives*, <http://your.kingcounty.gov/solidwaste/greenbuilding/commercial-incentives.asp> (last visited August 31, 2011). This program did not receive funding in 2011 due to the County's economic situation but the County hopes to continue the program in 2012.

<sup>44</sup> Seattle, Washington, Municipal Ordinance #122054 (April 12, 2006) <http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s1=LEED&s2=&s3=&s4=&s5=&Sect4=AND&l=20&Sect1=IMAGE&Sect2=THESON&Sect3=PLURON&Sect5=CBOR1&Sect6=HITOFF&d=CBOR&p=1&u=%2F%7Epublic%2Fbor1.htm&r=1&f=G> (last visited August 31, 2011).

<sup>45</sup> *Sustainable City Progress, Housing*, [http://www.smgov.net/Departments/OSE/Categories/Sustainability/Sustainable\\_City\\_Progress\\_Report/Housing/Green\\_Housing.aspx](http://www.smgov.net/Departments/OSE/Categories/Sustainability/Sustainable_City_Progress_Report/Housing/Green_Housing.aspx) (last visited August 31, 2011)

<sup>46</sup> *Public Policies Referencing or Adopting LEED*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852> (last visited August 31, 2011) [hereinafter *LEED Public Policies*]. There are government regulations that contain green building standards developed by the applicable government, or require compliance with the standards and/or certification process of LEED or another certification or standard. This paper focuses on the regulations that specifically reference or incorporate LEED, whether as the sole option or as one of several options.

<sup>47</sup> For an overview of the regulations that incorporate LEED, *see, e.g.*, *LEED Public Policies*, *supra*, note 46. *See also*, Sarah B. Schindler, *Following Industry's LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (April 2010) [hereinafter *Schindler*].

## LEED as a Form of Private Ordering or Co-Regulation

What is this trend of green building command-and-control regulation that requires adherence to standards set by a private body? Is it “private ordering”? There are varied definitions of private ordering; one idea is commercial private ordering is where private actors order their commercial affairs through rules or norms created by those actors without government interference.<sup>48</sup> It is also used to refer to the systems outside the legal system where rules are followed despite the lack of a legal requirement.<sup>49</sup> Other scholars have used private ordering to mean the sharing of regulatory authority with private actors by delegating authority to private actors.<sup>50</sup> More recently, scholars tend to call the sharing of regulatory authority between some form of private and public actors as “co-regulation”. In co-regulation, private actors have a role that is traditionally is a governmental role: setting standards, implementing them, or monitoring and enforcing standards.<sup>51</sup>

### Using LEED Standards

In the case of state or municipal green building regulations which require LEED certification, compliance is being dictated by adherence to a set of standards generated entirely by a private actor. And unlike other oft-cited examples of government regulation involving delegation of the authority for standards setting to a private actor, like the Internet Corporation for Assigned Names & Numbers (ICANN) and the Financial Accounting Standards Board (FASB), the U.S. Green Building Council was not created by the U.S. government with the express purpose of being an independent standards-setting organization that would be play a regulatory role and be subject to government oversight. Further, the LEED Green Building Rating System, unlike the standards developed by the International Standards Organization, were not standards developed explicitly as a model for adoption by others to achieve uniformity. In fact, representatives of the USGBC admit being surprised by the trend of LEED becoming incorporated into the law and appear to have some hesitation over the wisdom of mandates that unwittingly conscript the USGBC into a primary role in many binding regulatory regimes.<sup>52</sup>

At the same time, the USGBC has responded nimbly to the trend by continuing to improve and strengthen LEED by making the process ISO-compliant as described previously, and continuing to react to criticisms and incorporate improvements in its latest LEED rating systems. LEEDv3, for example, responded to common criticisms that LEED fails to prioritize credits that have the most environmental impact, notably increased energy efficiency, or to take into account regional differences.<sup>53</sup> Likewise, the USGBC has also embraced the increased government interest in the LEED Green Building Rating System, even hosting a “Federal Summit” for employees of agencies charged with implementing green building policies.<sup>54</sup>

Various levels of government and their agencies and authorities are also members of the USGBC---for example, the U.S. Army, The World Bank, the Smithsonian Institution, and the Commonwealth of Kentucky--- thus, they have access to the organization, can serve on committees and working groups and thus have opportunity to develop or review proposed

<sup>48</sup> See, e.g., Niva Elkin-Koren, *Copyrights in Cyberspace- Rights without Laws?*, 73 CHI.-KENT L. REV. 1155 at 1160(1998)

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319 (Fall 2002)[hereinafter *Schwarcz*]

<sup>51</sup> Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV 2029 at 2038 (November 2005) [hereinafter *Vandenbergh*].

<sup>52</sup> Speech by Christopher Pyke, Research Director of the U.S. Green Building Council, at PLI Conference on “Green Real Estate”, New York, NY (March 19, 2010).

<sup>53</sup> See, e.g., Schindler, *supra* note 47 at 322-324, 330-334.

<sup>54</sup> *Federal Summit 2010: Government Forum*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2217> (last visited August 31, 2011).

standards.<sup>55</sup> After a system of internal committees, proposed LEED rating systems are open to public notice and comment.<sup>56</sup>

It appears that the USGBC is self-consciously aware of the increased scrutiny of its standards and the need to protect the brand and is constantly reacting to changed circumstances and public criticism. In the USGBC's latest Strategic Plan, they acknowledge, "Government issued green building mandates have the potential to both strengthen the USGBC's position and to significantly undermine it."<sup>57</sup> In this way, the enhanced scrutiny due to public mandates has created pressure for the rapid and continual improvement of the LEED rating systems, and the USGBC is aware that its reputation is at stake. At the same time, green building mandates also mean a tremendous opportunity to expand market penetration of the USGBC's product.

## Benefits and risks of private standard-setting

The primary benefit of adopting a privately developed standard or governmental sharing of authority with a private body is one of efficiency. This justification is used particularly when the subject of the regulation is a highly technical one; the lowering of costs to create substantive standards for regulations can be achieved by relying on the expertise of private industry or technicians. This was the core justification, for example, in setting up the FASB (and its predecessors). The federal agencies have a history of adopting and incorporating by reference complex national consensus standards developed by private organizations, especially those that are industrial, technical or product related.<sup>58</sup> In fact there have been policy decisions to require it; for example, "the National Technology Transfer and Advancement Act requires federal agencies to use voluntary consensus standards where appropriate and when they will not conflict with applicable law, and to participate in the development of such standards when participation is consistent with the agency's mission."<sup>59</sup>

The efficiency argument for government entities to incorporate LEED standards or require certification is strong. Green building is a highly technical area requiring expertise by various professionals--for example, architects, engineers, urban planners, and the construction industry. The government does not have to promulgate the standards, nor reinvent the proverbial wheel. The USGBC has been promulgating, implementing, learning, revising and re-promulgating these standards since its first set of pilot standards were released in 1998 and was officially introduced in 2000.<sup>60</sup> However, there is some concern that if a governmental body doesn't have the technical expertise to create the technical standards in the first instance, it may not be properly positioned to critically evaluate the soundness of the standards being adopted or whether the standards are being properly met. The idea of a national consensus industry standard, however, creates some assurance that it is a well-developed, well-informed standard by relevant stakeholders that minimizes this risk to some degree. However, another risk results; the private standard setting body or self-regulatory organization may have different goals than the governmental body. The government may have other non-efficiency goals like environmental and health goals. Since LEED standards, unlike some other consensus standards, specifically have non-efficiency goals like environmental and health goals, the risk of the traditional industry heavy bias

<sup>55</sup> A search of the membership directory on the USGBC website, <http://www.usgbc.org/myUSGBC/Members/MembersDirectory.aspx?PageID=257&CMSPageID=140> reveals members including, but not limited to, the U.S. Army, The World Bank, Department of Home Land Security, National Park Service, National Institutes of Health (last accessed August 31, 2011).

<sup>56</sup> *LEED Public Comment*, <http://www.usgbc.org/LEED/LEEDDrafts/RatingSystemVersions.aspx?CMSPageID=1458> (last visited August 31, 2011).

<sup>57</sup> U.S. GREEN BUILDING COUNCIL STRATEGIC PLAN (2009-2013) at 13 <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1877&> (last visited August 31, 2011)[hereinafter *USGBC Strategic Plan*]

<sup>58</sup> Sidney Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 at 401 (2003).

<sup>59</sup> *Id.*

<sup>60</sup> *What LEED is*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1988> (last visited August 31, 2011).



towards less costly precautions that often results from a self-regulatory organization may be minimal. However, there is always a balance to be struck between efficiency and other normative goals; whether the proper balance is being achieved is always a debated matter. The USGBC seems to acknowledge this directly, by asserting that there are benefits even to imperfect green building regulation. In its latest strategic plan, it asserts:

“LEED has been adopted as the basis of mandates, while in others, requirements are less rigorous. Some are concerned about a growing patchwork of approaches. However, less rigorous but more widespread green building requirements might have more net environmental benefits, particularly if they include provisions requiring continuous improvement.”<sup>61</sup>

In addition to the concerns discussed above, there are other LEED specific concerns. One is that the green building movement has become more politicized as it has gained momentum and LEED has emerged as a market leader in certification. This is similar to the politics of the organic movement. The certification is too costly for small players; something can be “organic” or “green”, possibly even superior, without certification. There are also many fervent green building supporters who think LEED is not stringent enough and that as a consensus-based set of standards, it may be too sensitive to industry’s desire to keep costs down instead of making sounder environmental choices. This is a form of the “industry capture” concern that is raised when critiquing industry-based standards determining organizations. First of all, there is the argument that as a governmental entity engages with a private-setting body, and adopts its standards, it becomes harder for the government to influence those standards.<sup>62</sup> Also LEED’s market dominance has brought increased scrutiny and has led to lawsuits like challenging whether there are antitrust implications to LEED’s requirement of FSC-certified wood in some of its credits instead of providing for the use of other certified woods, or whether it has misled consumers by misrepresenting the energy performances in LEED certified buildings.<sup>63</sup> In fact, the energy-related performance of LEED certified buildings as designed versus as operated has been a tremendous source of criticism.<sup>64</sup>

The critiques of these government mandated standards come from a wide range of sources and for a variety of reasons.

## Critiques of private standards in a public role

A standard critique of private ordering centers on the role of the government and its exercise of regulatory authority. This criticism ranges from the position that the government should have no role, a limited role or an active role.<sup>65</sup> There are many who argue that green building (whether requiring compliance with LEED standards or not) should remain a completely voluntary process. This is a standard industry position. Do not regulate; provide incentives and the market will provide the guidance. Arguments by the real estate industry have focused on pragmatic concerns: increased costs for compliance particularly without supportive incentives, the split incentives between developers/owners to pay for green features including energy cost savings and the tenants who benefit from the resulting cost savings from reduced energy or water usage; and whether there are enough trained green professionals in and outside of the government to keep up with demand. There are other logistical problems, for example, in some of the municipal regulations, the timing becomes

<sup>61</sup> USGBC Strategic Plan, *supra* note 57 at 13.

<sup>62</sup> See Schindler, *supra* note 47 at 328-334.

<sup>63</sup> Bill Esler, *Updated: USGBC Vote Nixes Non-FSC Wood Credits* (December 7, 2010), available at <http://woodworkingnetwork.com/Updated--USGBC-Vote-Nixes-Non-FSC-LEED-Wood-Credits/2010-12-07/NewsArticle.aspx?oid=1288640&fid=WWN-INDUSTRY-NEWS&aid=2155> (last visited August 31, 2011).

<sup>64</sup> Jennie Rothenberg Gritz, *The Green Façade*, THE ATLANTIC (November 2009), <http://www.theatlantic.com/magazine/archive/2009/11/the-green-fa-ccedil-ade/7794/> (last visited August 31, 2011)(noting that widespread criticism of energy usage in green buildings has caused the USGBC to start requiring energy performance records for a year after certification)[Hereinafter, *Gritz*].

<sup>65</sup> See, e.g., Schwarz, *supra* note 50.

an issue if a certification is required for the issuance of building permits to commence construction.<sup>66</sup>

Furthermore, there is a loss of efficiency from this reliance on private standards if the governmental authority has to scrutinize too closely the compliance with LEED's substantive standard (when certification is not required, but meeting the standards for certification is) as well as inconsistency and uncertainty about what happens if a project that is required by law to achieve certification and fails to receive certification from the GBCI. If a project fails to achieve certification, will government entities have an additional appeal process on top of the appeal process provided by GBCI? Will the government body create a system of waivers or penalties in the event of non-compliance? There is always a danger in putting a price tag on penalties for non-compliance; if the penalty is too extreme, it is unjust, but a penalty that is too low may encourage developers to simply pay the penalty instead of complying with the law, especially if being fined is more cost-efficient.

Will developers sue the GBCI or the government if they fail to achieve certification or are found to be non-compliant? This could create an onslaught of litigation. Another area of uncertainty is whether the GBCI will revoke certifications granted if after certification it becomes apparent that documentation was inaccurate or contained erroneous determinations and calculations. As part of the latest amendments to the LEED Green Building Rating System, LEED v3, GBCI states in its policy manual that it has the ability to revoke certifications, including as a result of a third-party complaint filed to challenge a certification.<sup>67</sup> To date, there are no reported revocations of a LEED certification and until the USGBC has more opportunities to act, it will be difficult to evaluate how strong of an enforcement threat this ability to revoke is. Without a mechanism to verify that the buildings are operating in accordance to their certified design, it becomes difficult to measure the actual environmental benefit provided by a green building and its certification becomes misleading. One possible evolution of the LEED certification process is that GBCI may one day require that building owners submit periodic audits on an ongoing basis to maintain its certification status. Currently, the possible gap between the buildings as designed and operated, especially with respect to energy usage, is partially being closed. This is done by developers deciding to also comply with Energy Star standards or other energy efficiency metrics, or governmental bodies are explicitly requiring energy efficiency through codes or other laws. There has also been a recent change to the LEED certification process and now the submission of building performance reports for the first year of operation is required.<sup>68</sup>

It is important to note that green building, whether legally required or not, raises a whole host of insurance and bonding, and liability and contractual risk allocation issues among the owner, developer, architect, contractors and others.<sup>69</sup> While that discussion is outside of this paper's scope, these issues fall into the category of more unintended and pragmatic consequences of green building, especially if mandated and not voluntarily embraced.

While industry may prefer no regulation or self-regulation, on the other end of the spectrum, several scholars have argued that government should take an active role in requiring green buildings. One scholar has argued that not only should local governments enact mandatory green building standards, that the requirements should be more stringent

<sup>66</sup> For a discussion of this timing issue and other reasons why LEED does not translate well into a regulatory standard, see Schindler, *supra* note 47.

<sup>67</sup> GREEN BUILDING CERTIFICATION INSTITUTE, LEED CERTIFICATION POLICY MANUAL at 24 (June 17, 2011), available at [https://www.leedonline.com/irj/go/km/docs/documents/usgbc/leed/config/terms/Legal\\_Documents\\_Download/rating\\_system\\_doc\\_june\\_20\\_2011/June2011\\_Cert\\_Policy\\_Manual.pdf](https://www.leedonline.com/irj/go/km/docs/documents/usgbc/leed/config/terms/Legal_Documents_Download/rating_system_doc_june_20_2011/June2011_Cert_Policy_Manual.pdf) (last visited August 31, 2011)[hereinafter *GBCI Manual*]

<sup>68</sup> *Id.*; See also Gritz, *supra* note 64.

<sup>69</sup> See, e.g., Maura K. Anderson, James K. Bidgood, and Eugene J. Heady, *Hidden Legal Risks of Green Building*, 84 FLA. BAR J. 35 (March 2010) (a general discussion of the legal risks associated with a green building project)

than simply adopting LEED standards<sup>70</sup> and focused specifically on the needs of the local community. In other words, all real estate is local. On the other hand, another scholar has argued for a coordinated federal role similar to the federal government's role under the Clean Air Act where the EPA sets standards and the states develop implementation plans to achieve them.<sup>71</sup> This would achieve some level of uniformity and is driven by the recognition that the issue of climate change ignores political boundaries.

There are many benefits to local regulation of green building instead of federal regulation. Historically building regulations have been local, and allow for variability for pressing local needs like addressing seismic, flood or drought risks. Building codes are already in place by local governments which provide a natural home for mandatory green building elements, and as discussed, many local or state legislatures have begun to pass mandatory green building laws. Since real estate is inherently the building blocks of a community, it makes sense that the community should be able to address the needs and desires of the community. More stringent regulations may be able to be passed on a local level since it is typically easier to create a coalition within a smaller community than on a federal scale.

The shortcomings of local regulation include the danger of a "race to the bottom" where localities will compete for real estate development, especially in a weak economy, by having the least stringent standards.<sup>72</sup> It is also the case that while many localities have building codes in place, many of them have not been updated in more than ten years. The most obvious downside to local regulation is that while some externalities are felt more intensely locally, like soil erosion, water pollution, and air quality, environmental ills do not stop at municipal or state borders.

To make true progress in achieving clean air and water for all, as well as addressing a resource constrained world and the scourge of climate change, a national (or even international) effort would be more efficient in achieving measurable progress. The uniformity of national standards with respect to green building would in some ways assist developers who could then work with one set of standards. Even if there is cost associated with more stringent requirements, it would still be administratively efficient for developers to master and build in accordance to one standard than try to learn the patchwork of city, county, and state regulations that vary widely jurisdiction by jurisdiction. However, in the current political climate, a national green building bill would require bipartisan support to pass and may not be likely to happen soon with a nation focused on a recovering economy and national security. While a sustainable economy that conserves resources actually aids an economy and national security in the long run, this kind of long range view is not one that U.S. Congress or its constituents prioritize.

Currently the trend towards mandatory green building regulation has been at the municipal level and was at least partly motivated by federal inaction in this area.<sup>73</sup> If the U.S. Congress did pass green building legislation that was signed into law by the president, there could be a spate of federal preemption challenges where plaintiffs would most likely challenge a more stringent state or local regulation that is a greater burden than any national standard.<sup>74</sup> There have already been some lawsuits based on this theory. The Air Conditioning, Heating, and Refrigeration Institute ("AHRI"), along with other industry

<sup>70</sup> Schindler, *supra* note 47.

<sup>71</sup> Shapiro, *supra* note 28 (discussing how federal preemption could prevent lower levels of government from regulating green building and arguing for a model of cooperative federalism like the Clean Air Act).

<sup>72</sup> This may not be true for all jurisdictions, but rather only those real estate markets where a comparable market with different legal rules exists within a reasonable travel distance in order to service the same industries (*e.g.*, New York City and northern New Jersey).

<sup>73</sup> Schindler, *supra* note 47 at 291.

<sup>74</sup> Federal preemption is a doctrine based on the supremacy clause in Article VI of the U.S. Constitution that establishes the hierarchy of federal laws over conflicting state laws when the U.S. Congress intended to regulate the relevant area. Shapiro, *supra*, note 28. The courts review whether the U.S. Congress explicitly preempted the states from regulation, or implicitly. "In a case of implied preemption, the courts look at several factors, including: the extent of the federal regulatory scheme, the importance of the federal interest, and the potential frustration of federal goals in determining whether a state law is preempted." *Id.* at 266, citing *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956). There are also cases of state preemption in the green building area where a locality's regulatory authority is constrained by regulation at the state level. *Id.* at 269-270.

groups and contractors, challenged the City of Albuquerque in federal court claiming that parts of the city's building code<sup>75</sup> were preempted by federal statute.<sup>76</sup> The federal statutes at issue were the Energy Policy and Conservation Act of 1975<sup>77</sup> ("EPCA"), as amended by the National Appliance Energy Conservation Act of 1987<sup>78</sup> and the Energy Policy Act of 1992<sup>79</sup>. The Albuquerque code had options for compliance with mandated energy efficiency requirements, and at least one option in each of the two volumes were more stringent than those in the EPCA, as amended, for water heaters, furnaces, air conditioners, and other appliances.<sup>80</sup> The judge issued an injunction requested by AHRI as well as ruled that the Albuquerque code was preempted.<sup>81</sup>

In addition to the dispute over what is the appropriate mix of private action versus governmental action--- and by which level of government--- in the area of green building, there are also the traditional concerns that arise with private ordering or co-regulation where there is power sharing in setting, implementing, enforcing or overseeing standards. This includes a concern about legitimacy of the standards, including whether they resulted from a fair process and reasoned decision-making. Additionally, when the standards are developed by a private actor, there are concerns about the standards generating being anti-democratic or illegitimate because they have been created by a non-accountable actor.

While many of the mandatory green building laws that require LEED are being adopted at a local level, the critique of these laws based on privately developed standards as being anti-democratic or illegitimate are similar to traditional concerns that scholars have about administrative law on the federal level.<sup>82</sup> The role of nongovernmental actors in creating these federal regulations, like the municipalities or states' use of LEED as developed by the USGBC, is seen as diminishing further the connection between an electorate and regulations generated and administered by the governmental body and triggering heightened scrutiny of legitimacy and accountability. "Whether nonprofit or for-profit, private organizations may pursue different goals and respond to different incentives than do public agencies, interfering with their capacity to be as public-regarding as we expect agencies to be."<sup>83</sup>

However, this view has been questioned as overly simplistic and lacking nuance:

The view that private actors exacerbate the traditional legitimacy crisis in administrative law - - that they are menacing outsiders whose influence threatens to derail legitimate "public" pursuits - - features prominently in the dominant models of the field. And yet, private actors are also regulatory resources capable of contributing to the efficacy and legitimacy of administration.<sup>84</sup>

Professor Jody Freeman calls this "aggregated accountability", the idea that public and private entities act upon each other in a mix of formal and informal mechanisms and this interaction can maximize their collective capacities and can possibly increase accountability instead of decreasing it as feared.<sup>85</sup> The mix of public and private may be subjected to

<sup>75</sup> ALBUQUERQUE, N.M., ENERGY CONSERVATION CODE VOL. 1, § 5.5 (building envelope); id. § 6.5 (HVAC); id. § 7.5 (service water heating); id. § 9.5 (lighting).

<sup>76</sup> Air Conditioning, Heating and Refrigeration Inst. (A.H.R.I.) v. City of Albuquerque, No. 08-633 MV/RLP, 2008 U.S. Dist. LEXIS 106706 (D.N.M. Oct. 3, 2008)[*Hereinafter* A.H.R.I.]

<sup>77</sup> 42 U.S.C. §§ 6201-6422 (2006).

<sup>78</sup> NATIONAL APPLIANCE ENERGY CONSERVATION ACT OF 1987, PUB. L. NO. 100-12, 101 STAT. 103 (1987).

<sup>79</sup> ENERGY POLICY ACT OF 1992, PUB. L. NO. 102-486, 106 STAT. 2776 (1992).

<sup>80</sup> Shapiro, *supra*, note 28 at 267.

<sup>81</sup> A.H.R.I. at 37-38. However, in contrast, a federal court recently ruled that the state of Washington has the right to regulate the overall energy efficiency of its buildings and that its regulations were not preempted by federal statute. Paula Melton, *Federal Judge Upholds Washington Energy Codes* (March 21, 2011), <http://greensource.construction.com/news/2011/3/110321-WA-Energy-Codes.asp> (last visited August 31, 2011)

<sup>82</sup> Administrative law historically has been criticized as lacking a constitutional foundation, a violation of the general principles of separation of powers, and for not being directly accountable by being elected. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 at 545 [hereinafter *Freeman*]. Scholarship defending administrative law usually focuses on ways that agencies are "indirectly accountable by a virtue of myriad formal and informal controls, such as congressional and executive oversight, the appropriations process, judicial review, media scrutiny, interest group pressure, professional norms and bureaucratic management". Freeman, *supra* note 81, fn 5, *citing, e.g.*, Kathleen Bawn, *Choosing Strategies to Control the Bureaucracy: Statutory Constraints, Oversight, and the Committee System*, 13 J.L. ECON & ORG. 101, 102 (1997).

<sup>83</sup> Freeman, *supra* note 81 at 574 (describing a traditional view of private involvement in public regulation as troubling)

<sup>84</sup> Freeman, *supra* note 81 at 548-549.

<sup>85</sup> Freeman, *supra* note 81 at 549. See also Vandenbergh, *supra* note 51 (describing the increased role of private actors in government standard

“nontraditional accountability measures such as public participation in the drafting of private codes of conduct” and these codes “may then play an important role in holding regulated firms accountable to the government and the electorate”.<sup>86</sup>

The LEED standards promulgated by the USGBC and adopted or incorporated by local or state governments are standards that are developed by a membership organization made up of many stakeholders in the building industry: including engineers, real estate developers, contractors, architects, law firms, nonprofit organizations, individuals, and governmental bodies.<sup>87</sup> In addition, the way the LEED standards are developed through a process similar to the administrative law making procedure. The technical standards are developed by a committee of experts and members, and go through a chain of internal review before being open to comments.<sup>88</sup> Proposed standards are open to comments by members and the public and go through a notice and comment type procedure.<sup>89</sup> In this way the standards are influenced by a diverse membership, including governmental entities, and are also commented on and shaped by public feedback.<sup>90</sup>

Some scholars have critiqued the LEED development process and its subsequent incorporation into law as inadequate:

While the benefits of using an existing system, such as LEED, are certainly real, they do not outweigh the clear legitimacy-related benefits that a publicly promulgated system provides, including a democratic, transparent process that supplies interested parties with notice and an opportunity for voice and exit. Nor do they outweigh the stronger environmental benefits that result from a locally, publicly derived set of standards.<sup>91</sup>

However recent literature also suggests that it is not uncommon for non-governmental organizations to create standards that start as “soft law” and increasingly serve as the basis for government standards. While accountability is always a concern, with the proper process, many of these concerns can be alleviated through “broad participation, rigorous deliberative procedures, responsiveness to state law, incorporation of widely accepted norms, and competition among regulatory programs to achieve effective implementation and widespread public acceptance”.<sup>92</sup> The USGBC and its sister organization, GBCI, have taken many of these steps. The LEED rating systems go through a series of review by committees and public comment. LEED has been developed and is in competition with other green building certification regimes and locally developed municipal standards. The continual review and feedback process used to update the LEED rating systems results in well-developed, consensus-based standards.

Even if the question of whether the standard-setting by the USGBC is appropriate and its incorporation in public mandates desirable could be definitively answered, the logistics of the implementation of these regulatory standards as well as the expected and the appropriate level of oversight for enforcement of these standards-- by either the applicable governmental authority or the GBCI-- have been largely ignored.

### **Conclusion**

Despite the desire of the real estate industry to have free choice to decide whether to pursue green building (and if so, preferably bolstered by strong economic incentives provided by the government) the green building mandate is underway. The current

setting, implementation and enforcement including through second-order agreements which may have influence on the accountability and efficacy of the regulatory state).

<sup>86</sup> Vanderbergh, *supra* note 51 at 2039.

<sup>87</sup> *The U.S. Green Building Council, About Membership* <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1716> (last visited August 31, 2011).

<sup>88</sup> *The U.S. Green Building Council, About Committees*, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1742> (last visited August 31, 2011).

<sup>89</sup> *The U.S. Green Building Council, LEED Public Comment* <http://www.usgbc.org/LEED/LEEDDrafts/RatingSystemVersions.aspx?CMSPageID=1458> (last visited August 31, 2011)

<sup>90</sup> For a more in depth description of this process as well as a critique of its shortcomings, see Schindler, *supra* note 47 at 304-307.

<sup>91</sup> Schindler, *supra* note 47 at 316.

<sup>92</sup> See Errol Meidinger, *Competitive Supragovernmental: How Could It Be Democratic?*, 8 CHI. J. INT'L L. 513 (Winter 2008); See also Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 BROOK. J. INT'L L. 139.

patchwork of local regulations may at some point be supplanted by a mandate by the federal government, but for the most part, green building is largely being mandated by local and state governments. The current lack of political will and partisan politics at the federal level make it unlikely that a federal statute on point will be enacted soon. As the current green building eco-label market leader, LEED will continue to provide the most common national voluntary consensus to be adopted as part of the regulations. This means ideally the USGBC will continue to engage all stakeholders, including those from the government sector, in a rigorous and continuous development, review and improvement of its standards. This is a particularly critical process with respect to addressing the valid criticism that there is a fissure between LEED certified buildings as designed and LEED certified buildings as operated. This flaw greatly undermines the various governmental bodies' primary intention with respect to regulation: the reduction of greenhouse gas emissions.<sup>93</sup>

The current USGBC strategic plan reveals concerns about the burgeoning area of green building ranging from the lack of reliable data on the costs and performance of green buildings which will convince critical stakeholders of the value of green building to the lack of education about how to properly manage, operate and inhabit green buildings.<sup>94</sup> While the USGBC was created to shape the market and supports incentives to increase market penetration, it has also acknowledged that there are market failures where public policy can be a "necessary strategy", notably where "decoupling of design, construction, and operational budgets, which frequently leads to short-sighted decision-making in both the public and private sectors".<sup>95</sup>

These concerns must be addressed, along with the pragmatic concerns related to the administration and enforcement of the standards. The governmental entities mandating green building standards, including LEED, must not obliterate the efficiency gained by adopting a national consensus standard yet at the same time adopt "middle path" safeguards to infuse a level of rationality in implementation and play an important role in oversight.<sup>96</sup> These may include site visits prior to achieving compliance or periodic operational reviews, and a waiver or appeals process in addition to that provided by the GBCI. There needs to be an acknowledgement in jurisdictions where LEED certification is required that the certification is granted by the GBCI, not the government. While the GBCI may have its own appeal process, governmental bodies would be wise to adopt guidelines for handling a situation where a developer targets a certain level of LEED certification but fails to receive certification from the GBCI. At the same time, any penalties set must not be overly onerous to the point of quelling development but also not be so meaningless that it becomes economically preferable for a developer to pay the fines than to even strive for compliance. The fines could be paid into a fund earmarked for green building incentives or much needed trainings for professionals in this burgeoning area.

Whenever private standards are incorporated into the law, issues of democratic accountability and legitimacy are raised. However, as non-governmental organizations increasingly become quasi-governmental and engaged in standard-setting, the internal and external pressure creates an incentive to make the standard-setting process as inclusive, open and transparent as possible. This bodes well for allaying fears that this kind of standard-setting is a troubling form of co-regulation.

While many worry about the USGBC's self-interest in promoting their LEED products as regulatory standards, the USGBC has also expressed concerns over the legal mandates

<sup>93</sup> This highlights the importance of ongoing audits or other enforcement mechanisms to ensure that the reduced greenhouse gas emissions targeted in the design process are achieved. Another option would be to have outcome-based codes. This could provide more flexibility for designers and certainty of desired outcomes in design being achieved in operation. However, this could require a process overhaul, because then certification should be granted only after a certain period of building operation.

<sup>94</sup> USGBC Strategic Plan, *supra* note 57 at 12.

<sup>95</sup> *Id.* at 13.

<sup>96</sup> See Schwarcz, *supra* note 50 (arguing for "middle path safeguards" which provide safeguards for commercial private ordering but are lower cost than traditional safeguards).

of their standards. All of their concerns need to be addressed as well. The governmental bodies incorporating LEED as a standard should look at the practical issues raised in the administration of these requirements and create their own “middle path” review procedures beyond the certification process by GBCI. This ensures that they remain involved in the process while not jeopardizing the efficiency gained by importing a highly reviewed technical standard into their regulations. In the meantime, the USGBC can improve the outcomes by having the best possible green building standards; this can be achieved by engaging as many stakeholders in the process of developing their products and continuing to improve the LEED rating systems and the process by which certification is achieved.

The continued expansion and improvement of green building practices is in everyone’s best interest. The reduction of greenhouse gases and preservation of natural resources by optimizing the efficiency of the country’s building stock can play a vital role in the mitigation of climate change and environmental destruction. Buildings represent a tremendous opportunity for positive change due to the volume of emissions they represent and the new and constantly emerging technologies that allow for fairly inexpensive improvements in their design and operation. Also, unlike some other environmentally-conscious choices, green buildings do not require a shift in behavior viewed as unpalatable by consumers. On the contrary, studies show that occupants of green buildings tend to happier, healthier and more productive, which is also beneficial for our economy.

