
NOTES

LEEDING IN THE WRONG DIRECTION: ADDRESSING CONCERNS WITH TODAY’S GREEN BUILDING POLICY

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I. INTRODUCTION: WHAT IS GREEN BUILDING?.....	1378
II. BACKGROUND OF LEED	1380
III. INCORPORATION OF LEED INTO FEDERAL, STATE, AND LOCAL POLICY	1386
A. LEED IN FEDERAL POLICY	1386
B. LEED IN STATE AND LOCAL POLICY	1388
C. EFFECTS OF LEED-BASED GOVERNMENT POLICY	1392
IV. LEED: A CAUSE FOR CONCERN?	1393
A. CONCERNS WITH THE DELEGATION OF STANDARD SETTING TO USGBC.....	1393
B. CONCERNS WITH LEED’S EFFICACY	1403
V. ADDRESSING CONCERNS WITH LEED & LEED-BASED POLICYMAKING.....	1408
A. IMPORTANCE OF THE FEDERAL ROLE IN OVERSEEING GREEN BUILDING POLICY.....	1409
B. SPECIFIC SUGGESTIONS FOR IMPROVEMENT.....	1410
VI. CONCLUSION	1412

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I. INTRODUCTION: WHAT IS GREEN BUILDING?

There is a movement afoot in this country to “go green,” and part of this movement is in green building.¹ Green building is summarized as “the practice of increasing the efficiency of buildings and their use of energy, water and materials, and reducing building impacts on human health and the environment through better siting, design, construction, operation, maintenance and removal.”² So, why are we seeing a move to “go green” in building? According to a 2009 study commissioned by the U.S. Department of Energy (“DOE”), in 2006, buildings in the United States accounted for 39 percent of primary energy consumption, 72 percent of all electricity consumed, and, in 2005, over 10 percent of total water used domestically.³ Buildings in the United States accounted for more energy use than the entire U.S. transportation sector in 2006⁴ and produce more greenhouse gases than “any other country in the world except China.”⁵ Any large-scale attempt to reduce U.S. energy consumption must therefore involve greening building practices.

The construction, renovation, and demolition of buildings have severe environmental consequences as well. Building materials and infrastructure account for “up to 90% of all materials that have ever been extracted from the environment.”⁶ Waste from building construction and demolition accounts for approximately one-third of all landfill, and construction practices contribute to soil erosion and wastewater management problems.⁷

Green building also attempts to address the health of individual human occupants. The Environmental Protection Agency (“EPA”) states that

1. For instance, under the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 5007(a), 123 Stat. 115 (2009), the federal government slated over \$31 billion to investments in conservation and green building alone. See *Where the Government Is Spending in Green*, MCGRAW-HILL CONSTRUCTION, http://construction.com/stimulus/resource_center/green.asp (last visited July 9, 2012). The U.S. Green Building Council states that the green building economy is “projected to contribute \$554 billion to the U.S. gross domestic product from 2009–2013.” Press Release, U.S. Green Bldg. Council, New Study: Green Building to Support Nearly 8 Million Jobs over Next 4 Years (Nov. 11, 2009), available at <http://www.usgbc.org/Docs/News/Green%20building,%20green%20jobs%20and%20the%20economy%20-%20Booz%20Allen%20report%20GS.pdf>.

2. MARK J. BENNETT, J. CULLEN HOWE & JAMES L. NEWMAN, CURRENT CRITICAL ISSUES IN ENVIRONMENTAL LAW: GREEN BUILDINGS AND SUSTAINABLE DEVELOPMENT § 1.01[1] (2008).

3. See U.S. DEP’T OF ENERGY, 2009 BUILDINGS ENERGY DATA BOOK 1-1, 1-8, 8-1 (2009), available at http://buildingsdatabook.eren.doe.gov/docs%5CDataBooks%5C2009_BEDB_Updated.pdf.

4. See *id.* at 1–3.

5. BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.01[2].

6. Sarah B. Schindler, *Following Industry’s LEED®: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285, 288 (2010) (citation omitted).

7. *Id.*

people spend approximately 90 percent of their time indoors.⁸ The effect of more time spent indoors is an increase in exposure to potentially harmful indoor chemicals.⁹ In fact, polluted indoor air may be more harmful to building occupants than air pollution outdoors.¹⁰ In light of this, part of making buildings green involves not only reducing their environmental impact generally, but also reducing their impact on individual occupants specifically.

Concomitant with the move to greening in real estate has been a movement to support and encourage such development through an array of federal, state, and local policies. As this Note will argue, however, without proper oversight, the cutting-edge green building policies implemented today may become the follies of our future.¹¹ At the heart of the green building movement is the Leadership in Energy and Environmental Design (“LEED”) certification program developed by the nonprofit U.S. Green Building Council (“USGBC”). LEED had been called “the country’s most recognized seal of approval for green buildings,”¹² but it has also been the subject of much criticism.¹³ The primary concern this Note seeks to address is LEED’s reach. LEED today is much more than a simple private building certification system: it has become a major influence on—and, in many circumstances, a positive criterion of—local, state, and even federal building policies.¹⁴

The delegation of governmental decisionmaking authority to private entities has been criticized for its lack of transparency, public accountability, and provision of notice; for due process concerns; and for potential conflicts of interest.¹⁵ This Note does not, however, seek to settle

8. *The Inside Story: A Guide to Indoor Air Quality*, EPA, <http://www.epa.gov/iaq/pubs/insidestory.html#Intro> (last updated July 9, 2012).

9. ENV’T & HUMAN HEALTH, INC., *LEED CERTIFICATION: WHERE ENERGY EFFICIENCY COLLIDES WITH HUMAN HEALTH* 8 (2010), available at http://www.ehhi.org/reports/leed/LEED_report_0510.pdf.

10. *The Inside Story: A Guide to Indoor Air Quality*, *supra* note 8.

11. Perhaps a useful analogue is the related area of land-use policy, which has been the subject of much criticism for its failings: “As a whole, the United States’ land regulatory system is a failure. It is a policy of directed chaos—multiple programs and policies designed to address usually worthwhile goals but implemented . . . oblivious to their unintended consequences.” John Turner & Jason Rylander, *Land Use: The Forgotten Agenda*, in *THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY* 60, 63 (Marian R. Chertow & Daniel C. Esty eds., 1997).

12. Mireya Navarro, *Some Buildings Not Living Up to Green Label*, N.Y. TIMES, Aug. 30, 2009, http://www.nytimes.com/2009/08/31/science/earth/31leed.html?_r=2&th&emc=th.

13. See *infra* Part IV.

14. See *infra* Part III.

15. See, e.g., Lawrence A. Cunningham, *Private Standards in Public Law: Copyright, Lawmaking and the Case of Accounting*, 104 MICH. L. REV. 291, 343 (2005) (expressing copyright and

these broader administrative and constitutional law issues, nor does it set out a test for government entities to use to decide when or when not to adopt a privately promulgated standard as law. This Note's critique instead centers upon LEED—its background and pitfalls, one of which is its status as a government-adopted privately promulgated standard—and proposes a new regime of federal oversight, analysis, and policymaking to correct LEED's flaws.

Part II of this Note introduces LEED, giving readers some background into its genesis, evolution, and requirements. Part III discusses the various ways in which LEED has been incorporated into local, state, and federal policies. Part IV discusses various concerns with implementing LEED as a government standard, as well as concerns with LEED generally. Part V suggests necessary changes to the status quo to ensure that green building policy decisions are overseen by government entities as they are woven into the fabric of the next generation of building policy. Part VI concludes, emphasizing the importance of green building.

II. BACKGROUND OF LEED

The USGBC is a nonprofit trade group formed in 1993. USGBC's goal is to “promote and standardize green building methods as well as to raise the bar for these methods by continually adopting more rigorous green building standards.”¹⁶ Within one year of its formation, USGBC—comprised at the time of “architects, real estate agents, a building owner, a lawyer, an environmentalist, and industry representatives”—set out to

public accessibility concerns with the adoption of privately promulgated standards); Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 513 (2007) (proposing statutory requirements to avoid constitutional conflict concerns with the delegation of eminent domain powers to private actors); Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 542 (2011) (“Private individuals and entities can provide advice, work as initial factfinders, and implement details of federal governmental programs under governmental supervision, but the Constitution does not countenance delegation of the power to make binding decisions.”); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 694–95 (1986) (addressing the due process concerns inherent in the delegation of governmental powers to private entities); Jacob L. Barney, Note, *Beyond Economics: The U.S. Recognition of International Financial Reporting Standards as an International Subdelegation of the SEC's Rulemaking Authority*, 42 VAND. J. TRANSNAT'L L. 579, 583–84 (2009) (criticizing the SEC's adoption of accounting standards set by the International Accounting Standards Board as being beyond its administrative authority).

16. BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.04[1]. Today, USGBC's stated mission is “[t]o transform the way buildings and communities are designed, built and operated, enabling an environmentally and socially responsible, healthy, and prosperous environment that improves the quality of life.” USGB California, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2610> (last visited Sept. 23, 2012).

develop a green building certification system.¹⁷ After receiving funding from the DOE in 1997,¹⁸ LEED Standard Version 1.0 was promulgated by USGBC in 1999 as a voluntary system for rating green buildings.¹⁹ Since that time, LEED has grown to become the country's "most widely-used [green] building-rating system,"²⁰ and has been called "the internationally recognized mark of green building excellence, with more than 44,000 commercial projects participating, comprising over 8 billion square feet . . . of construction space in all 50 states and 120 countries."²¹ As of October 2012, the USGBC organization had 14,000 member organizations.²²

LEED standards are consensus based and "developed by USGBC member-based volunteer committees, subcommittees, and working groups, in conjunction with USGBC staff, and are then subject to review and approval by the LEED Steering Committee and the USGBC Board of Directors prior to a vote by USGBC membership."²³ USGBC membership is broad and includes, among others, architects, engineers, accountants, attorneys, consultants, building contractors, educational institutions, real estate brokers and developers, utility companies, and government entities at the local, state, and federal levels.²⁴ The LEED Steering Committee, which is tasked with "developing and maintaining LEED," is not representative of this diversity however: its volunteer voting members all hail from private architecture, technology, and consulting firms.²⁵ Similarly, the members of USGBC's Executive Committee and Board of Directors primarily work in the fields of building, manufacturing, consulting, finance, real estate, and related private industries.²⁶ In fact, the majority of members of USGBC's LEED Implementation Advisory Committee,²⁷ LEED Market Advisory

17. See U.S. GREEN BLDG. COUNCIL, FOUNDATIONS OF LEED 4 (2009) [hereinafter FOUNDATIONS OF LEED], available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=6103>.

18. ENV'T & HUMAN HEALTH, INC., *supra* note 9, at 11.

19. BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.04[1].

20. *Id.* § 1.03.

21. Edward T. McMahon, *The Greening of the Real Estate Industry*, URBAN LAND (Jan. 20, 2012), <http://urbanland.uli.org/Articles/2012/Jan/McMahonGreening>.

22. *About USGBC*, U.S. GREEN BLDG. COUNCIL 5, <https://www.usgbc.org/ShowFile.aspx?DocumentID=4686> (last updated Feb. 2012).

23. FOUNDATIONS OF LEED, *supra* note 17, at 6.

24. See *Member Directory*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/myUSGBC/Members/MembersDirectory.aspx> (last visited Sept. 20, 2012).

25. See *LEED Steering Committee*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1636> (last visited Sept. 20, 2012).

26. See *Board of Directors*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=2382&> (last visited Sept. 20, 2012).

27. See *LEED Implementation Advisory Committee*, U.S. GREEN BLDG. COUNCIL,

Committee,²⁸ LEED Technical Committee,²⁹ LEED Technical Advisory Groups,³⁰ and the vast majority of USGBC members generally³¹ come from private entities and not the public sector. The potential problems that arise from the predominance of private individuals setting government-adopted LEED standards are discussed in more detail in Part IV below.

In accordance with its objective that LEED is continuously improved, USGBC has introduced various new rating systems, including “a rating system specifically devoted to building operational and maintenance issues” and “rating systems for specific building typologies, sectors, and project scopes.”³² LEED today consists of nine unique but related rating systems—ranging from new and existing construction to schools and commercial interiors—which quantify the sustainable measures taken at each registered project, recognizing those that meet requisite standards.³³ USGBC purportedly continues to seek to improve its rating systems with the development of new versions through a pilot system that tests alternative paths to compliance and innovative building concepts and technologies.³⁴

LEED uses a point system to determine compliance with its rating guidelines and the level of certification that a registered building

<http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1785> (last visited Sept. 20, 2012). This committee is “charged with assessing and recommending solutions to the [LEED Steering Committee] for review and approval.” *Id.*

28. See *LEED Market Advisory Committee*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1787> (last visited Sept. 20, 2012). This committee’s responsibility is to advise the LEED Steering Committee on market-related issues to “ensure that all LEED systems are feasible and flexible and represent leadership in the market.” *Id.*

29. See *LEED Technical Committee*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1792> (last visited Sept. 20, 2012). This committee is “charged with assessing and recommending solutions to the [LEED Steering Committee] . . . to optimize LEED’s technical effectiveness and scientific validity.” *Id.*

30. See *LEED Technical Advisory Groups*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1795> (last visited July 10, 2012). The Technical Advisory Groups, under the management of the LEED Technical Committee, are “charged with assessing and recommending technical solutions” in the various LEED credit areas: “Sustainable Sites,” “Water Efficiency,” “Energy and Atmosphere,” “Materials and Resources,” “Indoor Environmental Quality,” and “Location & Planning.” *Id.*

31. See *Member Directory*, *supra* note 24.

32. FOUNDATIONS OF LEED, *supra* note 17, at 5.

33. See *LEED Rating Systems*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=222> (last visited July 10, 2012). The nine LEED rating systems are LEED for New Construction; LEED for Existing Buildings: Operations & Maintenance; LEED for Commercial Interiors; LEED for Core & Shell; LEED for Schools; LEED for Retail; LEED for Homes; LEED for Healthcare; and LEED for Neighborhood Development, which is currently a pilot program. *Id.*

34. See FOUNDATIONS OF LEED, *supra* note 17, at 8.

receives—for each criterion achieved, one point is awarded.³⁵ For example, a project applying for LEED for New Construction and Major Renovations certification may earn up to 110 points: up to twenty-six points for sustainable siting; ten points for water efficiency; thirty-five points for energy and atmosphere; fourteen points for materials and resources; fifteen points for indoor environmental quality; six points for innovation and design; and four points for regional priority criteria.³⁶ Projects must also satisfy prerequisites to be considered for certification, such as compliance with environmental laws and a commitment to sharing data on building water and energy usage.³⁷ Depending upon the number of points awarded, a building can achieve increasingly distinguished levels of LEED certification: Certified (forty or more points); Silver (fifty or more points); Gold (sixty or more points); or Platinum (eighty or more points).³⁸ LEED has no requirements, however, that a specific number of points from any one category be earned in order to qualify for certification, nor is any weight given to any specific points' particular environmental importance.³⁹ Also, there is no requirement that certain points be sought based on regional concerns—such as water conservation in dry areas or energy efficiency in hot climates prone to year-round air conditioning use.⁴⁰ On the contrary, the LEED standards are national, and the de minimis “regional priority” criteria are considered only “bonus” points—not requisites.⁴¹

In order to receive LEED certification, a project must be registered with the Green Building Certification Institute (“GBCI”), a USGBC affiliate organization.⁴² The application must be submitted by a “LEED

35. *Id.* at 10–11

36. See U.S. GREEN BLDG. COUNCIL, LEED 2009 FOR NEW CONSTRUCTION AND MAJOR RENOVATIONS vi–vii, available at http://www.gbci.org/Libraries/Credential_Exam_References/LEED-2009-for-New-Construction-Rating-System.sflb.ashx [hereinafter LEED PROJECT CHECKLIST]. For a brief description of each of these criteria, see *What LEED Measures*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1989> (last visited Sept. 20, 2012).

37. See U.S. GREEN BLDG. COUNCIL, MINIMUM PROGRAM REQUIREMENTS 3–5 (2011), available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=6715>.

38. See *How to Achieve Certification*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1991> (last visited Sept. 21, 2012).

39. See generally *id.* (explaining that certification can be achieved if all prerequisites are met and “the minimum number of points necessary” have been earned); Schindler, *supra* note 6, at 332.

40. See Schindler, *supra* note 6, at 322–23.

41. *Regional Priority Credits Frequently Asked Questions*, U.S. GREEN BLDG. COUNCIL, 1 (2009), <http://www.usgbc.org/ShowFile.aspx?DocumentID=5732>.

42. “The [GBCI] is a newly incorporated entity established with the support of the [USGBC] to administer credentialing programs related to green building practice and standards.” *Green Building Certification Institute*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1694> (last visited Sept. 21, 2012).

Project Administrator,” must meet “a unique set of documentation requirements,” and is ultimately reviewed and either approved or denied by GBCI.⁴³ There is also an appeal process for buildings that are not initially approved or that do not achieve the level of certification sought.⁴⁴

Project review is undertaken by an “independent, third-party,” though reviewers receive their credentials through GBCI.⁴⁵ The reviewer analyzes projects under six categories: selection of “Sustainable sites”; “Water efficiency”; “Energy and atmosphere” (for example, energy-efficient HVAC systems); “Materials and resources” (such as use of locally produced building materials and minimization of soil erosion); “Indoor environmental quality”; and “Design process.”⁴⁶ USGBC, however, “does not disclose the points it awards following its evaluation of individual building components and performance.”⁴⁷ Additionally, under most of LEED’s various rating systems, a building that has been LEED certified is subject to no further assessment, even as standards become more stringent or better methods and materials are recognized.⁴⁸ Under most of the LEED rating systems, in fact, there is virtually no requirement that actual building performance meets certain post-certification standards—a building will retain its LEED certification even if it is operating no more efficiently than a similar, noncertified building.⁴⁹ The only exception is the “LEED for Existing Buildings” rating system, which is designed to improve the operation and maintenance of existing buildings and requires energy performance reporting for the first five years after certification; decertification under this program could potentially result if a project is not performing as required.⁵⁰

43. See *Certification Guide*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/main-nav/building-certification/certification-guide/leed-for-new-construction/prepare-application/v3.aspx> (follow links to “Project Registration,” “Prepare Application,” “Submit Application,” “Application Review,” and “Certification”) (last visited Sept. 21, 2012).

44. See *id.*

45. See *Building Certification*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/main-nav/building-certification/leed-certification.aspx> (last visited Sept. 21, 2012); *About GBCI*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/org-nav/about-gbci/about-gbci.aspx> (last visited Sept. 21, 2012).

46. See BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.04[3].

47. ENV’T & HUMAN HEALTH, INC., *supra* note 9, at 10.

48. See BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.04[5][e].

49. See JAY STEIN & RACHEL REISS, ENSURING THE SUSTAINABILITY OF SUSTAINABLE DESIGN: WHAT DESIGNERS NEED TO KNOW ABOUT LEED 10 (2004), available at http://dada.cca.edu/~mbaum/Readings/07/Ensuring_Sustainability.pdf. For a more detailed discussion of the concerns that arise from this lack of monitoring see *infra* Part IV.

50. See Franklyn Cater, *Critics Say LEED Program Doesn’t Fulfill Promises*, NAT’L PUB. RADIO (Sept. 8, 2010), <http://www.npr.org/templates/story/story.php?storyId=129727547>; U.S. GREEN BLDG. COUNCIL, LEED FOR EXISTING BUILDINGS: OPERATION & MAINTENANCE 4 (2005), available at

Costs are a ubiquitous feature of the LEED certification process.⁵¹ Nonrefundable fees are paid to GBCI at both the registration and application stages—though discounts are given to USGBC members.⁵² A project developer must pay architects and engineers additional fees to document their compliance with LEED’s requirements.⁵³ For some projects, LEED-certified consultants—that is, consultants certified by GBCI—are hired directly by the developer to oversee the project process from design through final construction, further ensuring compliance, but also adding additional cost.⁵⁴ All told, the soft costs—those that do not involve actual hard site improvements—are estimated to range from 1.5 to 3.1 percent of total construction cost, though soft costs may account for as much as 5 percent of total construction cost.⁵⁵ This means that on a ten million dollar construction project, the soft costs of LEED certification alone could cost the building developer upwards of half a million dollars. The total cost of LEED compliance—both the soft and hard “greening” costs—is estimated to be between 4 and 11 percent of total construction cost.⁵⁶ These additional costs are supposed to be recouped as the building operates more cost effectively through reduced energy and water consumption,⁵⁷ and as tenants hoping to capture the goodwill benefits of going green pay premium rents for space in LEED-certified buildings.⁵⁸

Other green building rating systems have also been developed; one of the more prevalent is the EPA’s Energy Star program. Like LEED, Energy Star was developed as a voluntary green building rating system, but unlike most of LEED’s programs—which consider only on-paper compliance with stated design, build, and improvement criteria—Energy Star rates buildings based upon their actual energy and water usage relative to other buildings.⁵⁹ This provides a more reliable assurance that Energy Star

<https://www.usgbc.org/ShowFile.aspx?DocumentID=3617>.

51. BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.04[4].

52. See, e.g., *Building Design and Construction Fees*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/main-nav/building-certification/fees/bdc.aspx> (last visited Sept. 21, 2012).

53. AM. CHEMISTRY COUNCIL, ANALYZING THE COST OF OBTAINING LEED CERTIFICATION 4 (2003), available at http://www.cleanair-coolplanet.org/for_communities/LEED_links/AnalyzingtheCostofLEED.pdf.

54. *Id.* at 5.

55. *Id.* at 6.

56. *Id.* at 2.

57. See *id.* at 12–13.

58. See Andrew C. Burr, *CoStar Study Finds Energy Star, LEED Bldgs. Outperform Peers*, COSTAR GROUP (Mar. 26, 2008), <http://www.costar.com/News/Article/CoStar-Study-Finds-Energy-Star-LEED-Bldgs-Outperform-Peers/99818>.

59. See BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.05[2]. LEED for Existing Buildings is unique, however, in that it requires a certain Energy Star score before certification will be awarded.

buildings are actually conserving energy and water than does LEED. On the other hand, Energy Star does not take into account building materials and methods during the development or redevelopment stages, nor does it address occupant health the way LEED purports to—it is only concerned with rating the water and energy efficiency of existing buildings relative to one another.

The influence of LEED now extends beyond the individual buildings seeking certification: “the system is being woven into the fabric of the building industry.”⁶⁰ For new buildings today, many project designers use LEED standards as a benchmark.⁶¹ Moreover, as will be discussed in greater detail below, LEED’s reach is being further extended by government policies that incorporate LEED into building requirements at federal, state, and local levels.⁶²

III. INCORPORATION OF LEED INTO FEDERAL, STATE, AND LOCAL POLICY

As government entities have sought to go green, they have incorporated LEED into a wide array of building policies at all levels of government in the United States.⁶³ In fact, the USGBC states on its website that “LEED initiatives including legislation, executive orders, resolutions, ordinances, policies, and incentives are found in 442 localities . . . across 45 states . . . in 34 state governments . . . , in 14 federal agencies or departments, and numerous public school jurisdictions and institutions of higher education.”⁶⁴ Some of these policies merely reference LEED as an appropriate standard, while others require it.⁶⁵ This Note will summarize a variety of these policies and their effects.

A. LEED IN FEDERAL POLICY

The chief way in which LEED has been incorporated into federal policy is through requirements that buildings owned by the federal government achieve certain levels of LEED certification. Under the Energy Independence and Security Act of 2007, new federal buildings and those

Burr, *supra* note 58.

60. Cater, *supra* note 50.

61. *Id.*

62. *See infra* Part III.

63. *See* BENNETT, HOWE & NEWMAN, *supra* note 2, §§ 1.05–1.06.

64. *Public Policies Adopting or Referencing LEED*, U.S. GREEN BLDG. COUNCIL, <https://www.usgbc.org/DisplayPage.aspx?CMSPageID=1852> (last updated Dec. 20, 2011). The “34 state governments” figure includes the Commonwealth of Puerto Rico. *Id.*

65. *See id.*

undergoing major renovation are required to reduce “fossil fuel-generated energy consumption” relative to a 2003 baseline.⁶⁶ Before the passage of the Act, in 2006, the EPA and twenty other federal agencies—including the Departments of the Interior, Defense, Justice, State, and Transportation—signed the voluntary Federal Leadership in High Performance and Sustainable Buildings Memorandum of Understanding (“MOU”).⁶⁷ Under the MOU, these agencies committed to reporting and compliance measures established under the agreed on “guiding principles”: employment of integrated design principles for new buildings and integrated assessment, operation, and management principles for existing buildings; optimization of energy performance; water protection and conservation; enhancement of indoor environmental air quality; and reduction of the environmental impact of materials.⁶⁸ These guiding principles bear a striking resemblance to the LEED rating criteria discussed in Part II above, because, in fact, they were derived directly from LEED.⁶⁹ On January 24, 2007, President George W. Bush signed Executive Order 13423, which requires that new construction and major renovation of all federal agency buildings comply with the MOU.⁷⁰

Subsequent to signing the MOU, a number of federal agencies implemented policies either requiring LEED certification or citing LEED as an appropriate benchmark. For instance, the U.S. Department of Agriculture requires all new construction and major renovations of agency buildings to achieve a LEED Silver rating.⁷¹ The U.S. Department of Energy requires that for all new construction and major renovations in excess of five million dollars its buildings achieve LEED Gold certification.⁷² The DOE also requires that 15 percent of its existing

66. See Energy Independence and Security Act (EISA) of 2007, Pub. L. No. 110-140, § 433, 121 Stat. 1492, 1612 (2007) (codified as amended at 42 U.S.C. § 6834(a)(3)(D) (2007)).

67. Federal Leadership in High Performance and Sustainable Buildings: Memorandum of Understanding 6–10 (Jan. 24, 2006), available at http://www.epa.gov/greeningepa/documents/sustainable_mou_508.pdf.

68. INTERAGENCY SUSTAINABILITY WORKING GRP., HIGH PERFORMANCE AND SUSTAINABLE BUILDINGS GUIDANCE 10–14 (Dec. 1, 2008), available at http://www.fedcenter.gov/_kd/Items/actions.cfm?action=Show&item_id=11130&destination=ShowItem.

69. See DENNIS TALTON, NAVAL FACILITIES ENG'G COMMAND, SUSTAINABLE DESIGN & LEED 5 (2010), available at <http://www.ncmbc.us/0910-0955MR4ASustainableDesignandLEED.pdf.pdf>.

70. Exec. Order No. 13,423, 72 Fed. Reg. 3919 (Jan. 24, 2007).

71. USDA Directive 5500-001, USDA Facilities Energy and Water Conservation and Utilities Management § 8(d) (U.S.D.A. 2006), available at <http://www.ocio.usda.gov/directives/doc/DR5500-001.pdf>.

72. U.S. DEP'T OF ENERGY, DOE O-430.2B, DEPARTMENTAL ENERGY, RENEWABLE ENERGY AND TRANSPORTATION MANAGEMENT 8–9 (2008). It should be noted that Order 430.2B has been cancelled by Order 436.1. U.S. DEP'T OF ENERGY, DOE O-436.1, DEPARTMENTAL SUSTAINABILITY 1

buildings undergo greening under a plan that incorporates “the appropriate LEED building credits,” and for leased facilities, it has a stated “preference for buildings certified as LEED Gold.”⁷³ Other administrative agencies with LEED-based policies include the Department of State, the Department of Veterans Affairs, the EPA, and NASA.⁷⁴ The U.S. Army, Navy, and Air Force all encourage adherence to LEED in the development of new buildings and major renovations.⁷⁵ Although the National Defense Authorization Act of 2012 prohibits the use of Department of Defense funds to “be obligated or expended for achieving any LEED gold or platinum certification,” this prohibition can be waived by the Secretary of Defense with thirty days advanced notification that includes a cost-benefit analysis and “[d]emonstrated payback for the energy improvements or sustainable design features.”⁷⁶ The USGBC does not believe that this legislation poses an insurmountable roadblock to LEED certification in military buildings—in fact, they consider the waiver loophole big enough to “drive a Humvee through.”⁷⁷

B. LEED IN STATE AND LOCAL POLICY

The breadth of LEED-based policies at the state and local levels of government is too vast to cover in great detail here. As already noted, 442 localities and thirty-four state governments have adopted such policies.⁷⁸ Therefore, this Note will limit its discussion to a number of select provisions in order to give the reader an idea of their scope.

Similar to the federal policies discussed above, a number of states require state-funded buildings to achieve LEED certification. For instance, Arizona and California both require new state-funded buildings to achieve LEED Silver certification.⁷⁹ Colorado requires LEED for Existing Buildings for the operation and maintenance of all existing state buildings

(2011), available at <http://www.bnl.gov/ewms/pollutionpreve/docs/pdf/o436.1Final5-2-11.pdf>. However, Order 436.1 continues to support the guidelines in the MOU, requiring compliance with “the sustainability requirements contained in EO 13423,” and states that although Order 430.2B has been canceled, the cancellation, by itself, does not modify the obligations under 430.2B. *Id.* at 1–2.

73. U.S. DEPT OF ENERGY, DOE O-430.2B, *supra* note 72, at 9–10.

74. See *Public Policies Adopting or Referencing LEED*, *supra* note 64.

75. See *id.*

76. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 2830(b), 125 Stat. 1298, 1695–96 (2011).

77. Pete Danko, *Military Green Growth Offset by Congress*, EARTH TECHLING (Jan. 3, 2012), <http://www.earthtechling.com/2012/01/military-green-growth-offset-by-congress/>.

78. *Public Policies Adopting or Referencing LEED*, *supra* note 64.

79. See Ariz. Exec. Order No. 2005-05 (Feb. 11, 2005); Cal. Exec. Order No. S-20-04 (July 27, 2004), available at <http://www.dot.ca.gov/hq/energy/ExecOrderS-20-04.htm>.

“to the extent applicable and practicable,” and LEED for New Construction in new state buildings “to the extent that [it] is deemed cost effective.”⁸⁰ Illinois requires that, for all state-funded properties ten thousand square feet or more, new buildings and major renovations must achieve LEED Silver certification or an equivalent alternative standard.⁸¹ Washington State requires that all major facility projects receiving funding in the state capital budget, whether owned by public agencies or other entities, be “certified to at least the LEED silver standard.”⁸²

Several states offer tax incentives to developers who construct or renovate buildings meeting a certain level of LEED certification. For instance, among other tax incentives, Connecticut began offering in 2012 a tax credit of “(i) eight per cent of allowable costs for a [LEED] gold rating . . . and (ii) ten and one-half per cent of allowable costs for a [LEED] platinum rating.”⁸³ Iowa requires that, “in order to qualify for a tax credit or tax refund,” all sustainably designed projects must meet at least LEED Gold certification standards.⁸⁴ Nevada has adopted its own “Green Building Rating System,” based in large part on LEED criteria, and allows partial tax abatement for properties meeting certain of these criteria.⁸⁵

Local governments have incorporated LEED into an array of ordinances, as well as their zoning and building codes. Like the federal and state policies noted above that require government-owned and government-funded buildings to receive LEED certification, cities such as Oakland, Atlanta, Honolulu, and New York require certain municipal buildings to meet LEED Silver certification requirements.⁸⁶ The City of Miami requires

80. Colo. Exec. Order No. D 005 05 (July 15, 2005), *available at* <http://www.colorado.gov/dpa/doit/archives/govowens/eos/eo-05/d00505.pdf>.

81. 20 ILL. COMP. STAT. 3130 / 15 (2010).

82. WASH. REV. CODE § 39.35D.030 (2010). Major facility projects include those “larger than five thousand gross square feet of occupied or conditioned space as defined in the Washington state energy code.” However, such projects do not include “transmitter buildings, pumping stations, hospitals, research facilities primarily used for sponsored laboratory experimentation . . . or other similar building types,” or those for which the agency and design team determine LEED Silver is not practicable. *Id.* § 39.35D.020.

83. CONN. GEN. STAT. § 12-217mm(c)(2) (2011). Eligibility for the tax credit is not limited to LEED-certified projects and can be achieved by certification through any “other system determined by the Commissioner of Energy and Environmental Protection to be equivalent.” *Id.* “Allowable costs,” as defined by the statute, include construction, architectural, and many tenant improvement costs, but do not include the cost of land acquisition or site remediation. *Id.* § 12-217mm(a)(1).

84. *See* IOWA ADMIN. CODE r. 661-310.5 (2012). However, if a project has achieved a LEED Silver certification and the project manager has made a “good-faith effort” to obtain a higher certification, the directors of the project can still apply for a tax credit or refund.

85. *See* NEV. REV. STAT. §§ 701A.100–110 (2011).

86. *See* OAKLAND, CAL., CODE OF ORDINANCES §§ 15.35.030–040 (2010) (requiring all new building projects or renovations of buildings owned or occupied by the City of three million dollars or

all new privately developed buildings of “more than 50,000 square feet of Habitable Rooms and Habitable Space” in certain zones to be certified at a minimum level of LEED Silver or equivalent city-adopted standard.⁸⁷ The City of Chicago offers expedited permitting for an array of commercial projects seeking LEED Silver certification or higher.⁸⁸ Baltimore County, Maryland offers ad valorem tax credits at different levels for properties receiving LEED Silver, Gold, or Platinum certification.⁸⁹ Additionally, the City of Cincinnati, Ohio offers a property tax exemption of 100 percent for fifteen years for newly constructed residential, commercial, and industrial LEED-certified properties; twelve years for remodeled industrial, commercial, and four-unit or greater multifamily LEED-certified properties; and ten years for remodeled one-to-three unit residential LEED-certified properties.⁹⁰

One notable exception to the states that have chosen LEED as their green building benchmark is Maine, which, like many states, required LEED certification in “new or expanded state-owned buildings.”⁹¹ On December 7, 2011, however, Maine Governor Paul LePage signed an executive order that essentially banned the use of LEED in state construction by requiring use of purportedly lower building standards instead of LEED standards.⁹² The rationale behind Governor LePage’s executive order is the failure of LEED to recognize the sustainability of any timber products not certified by the Forest Stewardship Council (“FSC”).⁹³

more to be LEED Silver certified); ATLANTA, GA., CODE OF ORDINANCES § 75-19 (2010) (requiring new construction and renovations of city-owned facilities of 5000 gross square feet or costing two million dollars to incorporate sustainable design criteria meeting LEED Silver rating); HONOLULU, HAW., REV. ORDINANCES § 2-9.3 (2011) (requiring certain city facilities with a floor area greater than 5000 square feet to comply with LEED Silver as the minimum design standard); N.Y.C., N.Y. CITY CHARTER § 224.1 (2009) (requiring certain city-funded capital projects of two million dollars or more involving the construction or substantial renovation of buildings to be designed in accordance with LEED Silver standards or another green building standard promulgated by the mayor).

87. See MIAMI, FLA., ZONING CODE § 3.13.1 (2011).

88. See *Overview of the Green Permit Program*, CITY OF CHI., http://www.cityofchicago.org/city/en/depts/bldgs/supp_info/overview_of_the_greenpermitprogram.html (last visited Sept. 21, 2012).

89. For instance, LEED for New Construction Gold-certified properties receive a five-year tax credit of 60 percent of total assessed county property tax. See BALTIMORE CNTY., MD., CODE OF ORDINANCES §§ 11-2-203.1–203.2 (2010).

90. See CINCINNATI, OHIO, CODE OF ORDINANCES 446-2007 (2007).

91. Lloyd Alter, *State of Maine Bans Use of LEED in State Construction*, TREE HUGGER (Dec. 21, 2011), <http://www.treehugger.com/green-architecture/state-maine-bans-use-lead-state-construction.html>.

92. See *id.*; Me. Exec. Order No. 27 FY 11/12 (Dec. 7, 2011), available at <http://www.maine.gov/tools/whatsnew/attach.php?id=323510&an=1>.

93. Phil Bowers, *Occupy USGBC? Maybe It's Time*, WOODWORKING NETWORK (Mar. 6, 2012, 4:10 PM), <http://www.woodworkingnetwork.com/wood-blogs/woodworking-industry-trends-guest-bloggers/Occupy-USGBC-Maybe-Its-Time-141605673.html>.

Only 25 percent of North America's certified forests are FSC certified, and the majority of FSC-certified forests are located overseas.⁹⁴ The concern is that developers seeking LEED certification will opt for timber grown abroad and shipped into the United States (at a substantial environmental cost), rather than using comparable domestically grown timber products.⁹⁵ Governor LePage's executive order calls for the use of "'Green Building' standards that give certification credits equally to forest products grown, manufactured, and certified under the Sustainable Forestry Initiative, Forest Stewardship Council, American Tree Farm System and Programme for the Endorsement of Forest Certification systems."⁹⁶ In other words, not LEED. The Natural Resources Defense Council ("NRDC") has derided the executive order, saying that "[t]he Governor's action constitutes government-sponsored greenwashing. Eliminating LEED effectively turns Maine's once-great green building program into business-as-usual."⁹⁷ The commissioner of Maine's Department of Conservation responded to the criticism, stating that the order supports the State's broader commitment to "voluntary forest certification."⁹⁸ The commissioner further noted that the order "will create an even playing field among the diverse forest certification groups, both nationally and internationally," with the result being that state-owned buildings "will be able to [be constructed] using the certified wood products from the local sawmill," rather than shipped over great distances, at the expense of both sustainability and the local economy.⁹⁹ The governor has received the support of "[a]pproximately 100 government officials, including 14 governors, [who] have written to the USGBC calling for fair treatment of wood and forest certification standards."¹⁰⁰ At the end of the day, however, these officials are powerless to change LEED and may have to instead follow the lead of Governor

94. Press Release, Sustainable Forestry Initiative, LEED's Artificial Barriers Continue to Fail Responsible Forestry (Mar. 6, 2012) [hereinafter Sustainable Forestry Initiative Press Release], available at http://www.sfiprogram.org/files/pdf/news-releases/PR_SFI_LEED_03-06-12_FINAL.pdf.

95. *Id.*

96. Me. Exec. Order No. 27 FY 11/12 (Dec. 7, 2011).

97. Press Release, Nat'l Res. Defense Council, Governor LePage Undermines Maine's Green-Building Economy, Sets Back Sustainable Forestry (Dec. 12, 2011), available at <http://www.nrdc.org/media/2011/111212.asp> (quoting NRDC's forestry specialist, Sami Yassa) (internal quotation marks omitted).

98. See Steve Mistler, *Environmental Group Says LePage 'Green' Order Promotes Destructive Logging*, ME. SUN J. (Dec. 13, 2011, 1:13 PM), <http://www.sunjournal.com/news/state/1127409> (quoting Maine Department of Conservation Commissioner, Bill Beardsley) (internal quotation marks omitted).

99. *Id.* (quoting Maine Department of Conservation Commissioner, Bill Beardsley) (internal quotation marks omitted).

100. Sustainable Forestry Initiative Press Release, *supra* note 94, at 2.

LePage.

C. EFFECTS OF LEED-BASED GOVERNMENT POLICY

As a result of the various policies either requiring or encouraging LEED certification for government buildings, U.S. government entities are the biggest users of LEED: as of 2003, 48 percent of all LEED-registered projects were owned by either local or state governments or by the federal government.¹⁰¹ This figure represents approximately one-sixth of all public-sector buildings.¹⁰² The American Chemistry Council estimated that the cost of obtaining LEED certification in the public buildings already registered has been between “\$900 million and \$2.2 billion annually.”¹⁰³ The preference of government entities to lease space in LEED-certified buildings only increases costs further, because the government is driving up demand for a limited supply of LEED-certified space. In fact, leases in LEED-certified buildings command annual “rent premiums of \$11.33 per square foot” over similar non-LEED properties.¹⁰⁴ This means that on a 50,000 square foot rental, the rent premium for LEED-certified space could cost the tenant more than half a million dollars per year over and above a lease on comparable non-LEED-certified space. In light of the money the government is investing in green buildings, as well as the fact that it is by far the biggest user of LEED, it has a very strong interest in ensuring that the green building policies it is implementing truly are working toward the goals sought to be achieved: energy efficiency, occupant health, and environmental sustainability.

The prevalence of LEED-based policies at all levels of government has had a major effect in making LEED the country’s “most widely-used [green] building-rating system.”¹⁰⁵ Developers across the country are incentivized to build LEED-certified properties due to such benefits as expedited permitting and property tax exemptions and credits; in some cities, they are required to do so. This trend will likely continue as these policies are adopted by additional states, counties, and municipalities. Unfortunately, there is an array of concerns with the broad adoption of LEED, both as a government standard and with adoption of LEED generally.

101. U.S. DEP’T OF ENERGY, *supra* note 3, at 9–8. Note that this figure predates the signing of the MOU, which has led to considerably more LEED development by the federal government. *See supra* Part III.A.

102. AM. CHEMISTRY COUNCIL, *supra* note 53, at 9.

103. *Id.*

104. Burr, *supra* note 58.

105. BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.03.

IV. LEED: A CAUSE FOR CONCERN?

There are a number of potential concerns with LEED, both as a criterion of government policy and with LEED generally. This Note attempts to address both the problems that arise from using LEED as a government-required standard and concerns about the effectiveness of LEED in creating truly “green” buildings.

A. CONCERNS WITH THE DELEGATION OF STANDARD SETTING TO USGBC

One of the chief concerns with LEED is that its adoption as government policy takes the setting of building standards out of the hands of policymakers and places it into the hands of the private sector—namely, private-sector individuals who stand to profit from the sale of the very goods and services that LEED certification requires.¹⁰⁶ Government policies giving standard-setting authority to private entities raise potential nondelegation doctrine concerns. While a complete analysis of this doctrine is beyond the scope of this Note, it is important to give some background in order to understand why LEED’s broad adoption by government entities is perhaps less acceptable than delegation in other policy areas. This section proceeds with a discussion of government delegation to private entities generally—concerns, justifications, and examples—and then, more specifically, with an assessment of why the delegation of green building policy standards to the USGBC is problematic.

1. Delegation of Government Decisionmaking Authority Generally

The nondelegation doctrine limits “the conveyance of constitutionally assigned power to either another branch of government that may not be constitutionally authorized to wield it or to a non-governmental body.”¹⁰⁷ In the administrative law sense, the nondelegation doctrine posits that Congress cannot delegate its power to agencies without “laying down ‘an intelligible principle’ to which the administrators must conform.”¹⁰⁸ The doctrine, however, has fallen into disuse in the federal context: it has not been invoked to invalidate a federal statute since the 1930s, and today it

106. John Wargo, *LEED Building Standards Fail to Protect Human Health*, YALE ENV’T 360 (Aug. 16, 2010), <http://e360.yale.edu/mobile/feature.msp?id=2306> (“The job of setting standards for new construction . . . should not be left to a private-sector organization dominated by members who profit from the sale of goods and services to the building sector.”).

107. See Johnson, *supra* note 15, at 460.

108. See WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1136 (4th ed. 2007) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

appears to exist only as a canon of statutory interpretation.¹⁰⁹ The Supreme Court has only once considered the issue of legislative delegation to private actors,¹¹⁰ so it has essentially acquiesced to congressional discretion in deciding when to delegate and to whom.¹¹¹ However, the Court has occasionally referred to the doctrine. For example, Justice Brennan once cautioned, “Formulation of policy is a legislature’s primary responsibility, entrusted to it by the electorate, and to the extent Congress delegates authority under indefinite standards, this policy-making function is passed on to other agencies, often not answerable or responsive in the same degree to the people.”¹¹²

At the state level, courts have used the nondelegation doctrine with much more frequency “to assess the state constitutionality of a transfer or delegation of legislative power to non-governmental actors or to private parties.”¹¹³ State courts generally find the delegation to private actors more problematic than delegation to administrative agencies for a number of reasons, such as the inability to hold private actors accountable, potential for conflicts of interest between the public and the delegate,¹¹⁴ and the fact that the judiciary considers some powers “essentially governmental: rulemaking, adjudication of rights, seizure of person or property, licensing and taxation.”¹¹⁵ Other concerns about delegation of public standards to private actors include a lack of transparency and legitimacy in the rulemaking process, concerns about notice and availability of information, efficacy of the standards promulgated, and lack of public voice.¹¹⁶ Unfortunately, there is no set standard that state courts have adopted to decide when delegation to private actors is appropriate; some courts have flatly prohibited such delegation while a number of courts have expressly allowed delegations that are “reasonable.”¹¹⁷

In seeking to understand why delegation in many contexts has been upheld, it is important to consider arguments in favor of delegation as well

109. *Id.* at 1138 (“If a court is faced with an extremely broad delegation that might implicate constitutional concerns, it uses the canon to adopt a narrow interpretation that would restrain agency discretion.”).

110. Johnson, *supra* note 15, at 461 n.16 (discussing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)).

111. See GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 413 (6th ed. 2009) (“Under current doctrine, there are very few, if any, constitutional restraints on Congress’s power to delegate.”).

112. *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring).

113. Johnson, *supra* note 15, at 460–61.

114. *Id.* at 462 (footnotes omitted).

115. Lawrence, *supra* note 15, at 648.

116. Schindler, *supra* note 6, at 342–44.

117. Lawrence, *supra* note 15, at 650.

as some of its potential benefits. One justification of private delegation is pluralism—the idea that the United States is a society with “many competing power centers, both public and private.”¹¹⁸ It has been argued that pluralism allows for a system of mutual control, where individual liberties are protected against the single-mindedness of a hierarchical government.¹¹⁹ Nonetheless, proponents of this theory concede that “any single private delegation will have only an insignificant effect on the pluralistic nature of our society.”¹²⁰ Another justification for delegation is that it more fully represents the interests of the group who will be affected by the policy in question.¹²¹ One example is the private arbitration of industrial disputes, where an arbitrator will likely have a greater understanding of industry practices than would a judge.¹²² This reasoning is shaky when it comes to the setting of standards by private groups, however, because many nondelegative options are available: consultation between affected groups and administrative agencies, appointments of those affected to administrative boards, and advisory commissions, to name a few.¹²³ A third justification is the flexibility of private actors in their ability to respond to rapidly changing or complex situations, as compared with the rigidity of government actors.¹²⁴ This reasoning is undermined, however, when the private actor itself is bureaucratic in nature.¹²⁵ There is no reason to expect a private bureaucratic body, with numerous stakeholders involved and a pluralistic voting process, to act any more efficiently than would the government. A fourth justification for delegation is the private actors’ expertise in the specific field in question: sometimes persons with expertise may be unavailable or too costly to be employed by the government directly.¹²⁶ One example is “[t]he reliance on the scientific standards of the United States Pharmacopeia for a statutory definition of ‘drugs,’” which has been consistently upheld in state courts.¹²⁷ A final justification for private delegation is potential cost savings.¹²⁸ “[I]t may be substantially cheaper for government to delegate power to private actors than to

118. *Id.* at 652.

119. *Id.*

120. *Id.*

121. *Id.* at 653.

122. *Id.*

123. *Id.* at 654.

124. *Id.*

125. *Id.* at 654–55.

126. *Id.* at 656–57.

127. *Id.* at 657 (footnote omitted).

128. *Id.*

undertake an activity itself.”¹²⁹ Examples include the delegation of authority to humane societies to enforce animal cruelty statutes, the allowance to private railroads to exercise eminent domain power, and the creation of private arbitration schemes, all of which save the government time and money.¹³⁰

As a further example of delegation held to be permissible, consider *Independent Electricians & Electric Contractors’ Ass’n v. New Jersey Board of Examiners of Electrical Contractors*.¹³¹ In this case, a group of independent electrical contractors sought to invalidate a state statute that required adherence to the privately promulgated National Electrical Code, arguing that it was “an unconstitutional delegation of legislative authority to a private organization to set standards.”¹³² In upholding the statute, the Supreme Court of New Jersey reasoned that, although the Code had “no formal governmental aegis,” it had been widely adopted on a national scale.¹³³ Furthermore, it noted that

[t]he Code is promulgated by the National Fire Protection Association and the American Standard Association through 17 panels of recognized electrical and safety experts throughout the country, who review and revise it every three years. The procedures of adoption, review and revision reflect a national consensus of manufacturers, consumers, scientific, technical and professional organizations, and governmental agencies.¹³⁴

The court’s short opinion, however, does not tell the whole story: of particular relevance is the efficacy of the privately promulgated standards in accomplishing their goal of building safety. “With respect to these standards, an overly cautious industry has captured the regulatory drafting body: insurance companies.”¹³⁵ Because insurance companies are primarily interested in minimizing claims, “they want to ensure that buildings are going to be constructed in conformity with highly protective, fire-resistant standards.”¹³⁶ Thus, the efficacy of the standard, as well as the broad input by affected persons, is of particular relevance to the legitimacy of private delegation of standard setting.

129. *Id.*

130. *Id.* (footnotes omitted).

131. *Indep. Electricians & Elec. Contractors’ Ass’n v. N.J. Bd. of Examiners of Elec. Contractors*, 256 A.2d 33 (N.J. 1969).

132. *Id.* at 41.

133. *Id.* at 42.

134. *Id.*

135. Schindler, *supra* note 6, at 332.

136. *Id.*

One example of a court invalidating the delegation of authority to a private actor is *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, in which the Supreme Court of Texas considered the state constitutionality of a Texas statute authorizing a private foundation to set standards and collect fees from cotton growers in an effort to eradicate the boll weevil.¹³⁷ Setting out an eight-factor test,¹³⁸ the court found the statute to be an impermissible delegation of legislative authority, reasoning that “[f]ar from merely devising eradication guidelines, the Foundation actually applied the programs it devised”; “[t]he Foundation board members are cotton growers who have a direct pecuniary interest in the eradication programs implemented by the Foundation”; “there is no assurance that those elected [to the Foundation’s board] will actually have special qualifications or training regarding eradication of boll weevils”; and finally, “[t]he Legislature has provided very few statutory standards to guide the Foundation.”¹³⁹

As noted at the outset, the purpose of this Note is not to settle the broader administrative or constitutional law issue of delegation. Likewise, this Note does not set out to make an outright case for judicial invalidation of policies adopting LEED; in light of the disuse of the nondelegation doctrine in the federal context, the call for judicial invalidation at that level of government is likely futile. At the state level, no widely adopted rule exists. Nevertheless, the factors considered by the court in *Texas Boll Weevil* are a useful starting point for considering why private delegation to USGBC is problematic.¹⁴⁰

2. Delegation of Decisionmaking Authority to USGBC

LEED-based policymaking is essentially equivalent to the delegation of the setting of green building standards by the government to USGBC,

137. *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 457 (Tex.1997).

138. The complete eight-factor test set out by the court for determining permissibility of delegation, as a distillation of the writings of various scholars and other courts, is as follows:

1. Are the private delegate’s actions subject to meaningful review by a state agency or other branch of state government?
2. Are the persons affected by the private delegate’s actions adequately represented in the decisionmaking process?
3. Is the private delegate’s power limited to making rules, or does the delegate also apply the law to particular individuals?
4. Does the private delegate have a pecuniary or other personal interest that may conflict with his or her public function?
5. Is the private delegate empowered to define criminal acts or impose criminal sanctions?
6. Is the delegation narrow in duration, extent, and subject matter?
7. Does the private delegate possess special qualifications or training for the task delegated to it?
8. Has the Legislature provided sufficient standards to guide the private delegate in its work?

Id. at 472.

139. *Id.* at 473–75.

140. *See id.* at 472.

whether in the context of tax incentives, permit expediting, or a mandate to build LEED-certified buildings. It is problematic because it arouses many of the policy concerns at the heart of the nondelegation doctrine. Below, this Note discusses the concerns with LEED-based policymaking using several of the factors announced in *Texas Boll Weevil* as a guide.

a. Are USGBC's Actions Subject to Meaningful Government Review?

As a recent critique of LEED noted, the USGBC is “unaccountable to the public, and . . . free[] from oversight by either the Congress or state legislatures.”¹⁴¹ Perhaps the DOE, in funding the establishment of the LEED rating system, exercised some control in the program's initial development, but no direct oversight remains today. Thus, the short answer to the question above is no—there is no meaningful ongoing governmental review of LEED's standards. Although numerous government entities are themselves members of USGBC,¹⁴² and thus have some say in developing the standards it sets, this is no substitute for actual governmental oversight, particularly when the majority of USGBC members are private entities that may have pecuniary interests that compete with the goals of the government entities adopting its standards as policy.¹⁴³ The lack of control the government wields over LEED standard setting is exemplified by the recent call by numerous government officials for USGBC to recognize non-FSC-certified timber.¹⁴⁴ Absent an invalidation of all LEED-based policies, however, all these officials can do is wait and hope that USGBC members act.

b. Are Persons Affected by USGBC's Actions Adequately Represented in the Decisionmaking Process?

The persons most directly affected by LEED-based government policies are those in building and related industries, who must comply with LEED's standards in order to receive certification and abide by the government policies incorporating those standards. With USGBC's broad membership from both the public and private sectors, many different perspectives are represented within the organization.¹⁴⁵ USGBC prides

141. ENV'T & HUMAN HEALTH, INC., *supra* note 9, at 10.

142. *See supra* Part II.

143. *See* Schindler, *supra* note 6, at 328–29 (arguing that the standards set by an industry-dominated organization will be insufficient to meet “a government mandate that aims to aggressively alleviate local environmental externalities and combat greenhouse gas emissions and other negative contributors to climate change”).

144. *See supra* Part III.B.

145. *See supra* Part II.

itself on the participation of members from various industries, stating that “LEED development follows a structure that includes a balanced representation of stakeholders and management of conflict of interest, to ensure that the development of LEED is transparent and consensus-based.”¹⁴⁶ USGBC has even sought the help of its critics in improving its rating system.¹⁴⁷ As previously noted, the involvement of “manufacturers, consumers, scientific, technical and professional organizations, and governmental agencies” in the National Electrical Code standard-setting process was a major consideration in the Supreme Court of New Jersey’s decision to uphold the statutory delegation of authority to the National Fire Protection Association.¹⁴⁸

Despite USGBC’s broad member base, however, concerns remain over whether it adequately represents all affected persons’ interests. Because LEED was developed as a voluntary standard, those who wanted to be subject to it—specifically those involved in green building—could decide whether or not they wanted to participate in its development. However, “[t]ransforming voluntary participation into mandatory compliance forces those . . . who were not involved with the development of the standards to comply with them.”¹⁴⁹ This means that governments, private entities, and individuals who played no part in LEED’s development may be subject to its rules and restrictions, and even now may have their voice heard in the organization only by paying to play.¹⁵⁰

Other stakeholders outside the building industry may be underrepresented as well. These include members of the public affected by buildings’ environmental externalities,¹⁵¹ as well as taxpayers who are footing the bill for the development of LEED-certified government properties. The public has a limited voice in the establishment of LEED’s policies, and only USGBC members are allowed to vote on the standards it promulgates. “[T]here is no true incentive for most individuals who are not in the development industry to participate in [USGBC], not knowing that

146. FOUNDATIONS OF LEED, *supra* note 17, at 6.

147. See, e.g., Open Letter from S. Richard Fedrizzi, President, CEO, & Founding Chair, U.S. Green Bldg. Council, to Env’t & Human Health, Inc. (June 4, 2010), available at http://www.usgbc-houston.org/files/1545_Open_Letter_to_EHHL.pdf (asking the nonprofit Environment and Human Health, Inc., a critic of LEED’s efficacy, for help to “continue the evolution of LEED”).

148. See *Indep. Electricians & Elec. Contractors’ Ass’n v. N.J. Bd. of Examiners of Elec. Contractors*, 256 A.2d 33, 42 (N.J. 1969).

149. Schindler, *supra* note 6, at 336.

150. See *Categories & Dues*, U.S. GREEN BLDG. COUNCIL, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=56> (last visited Sept. 22, 2012).

151. Schindler, *supra* note 6, at 337.

compliance with those standards may eventually be required of developers in their towns.”¹⁵²

Concerns have also been expressed about the decisionmaking structure within USGBC. For instance, USGBC requires that only five member-categories be represented on each of its committees; this means that “it is entirely possible that only building industry insiders could comprise a committee,”¹⁵³ potentially resulting in only a narrow subset of interests being represented. Furthermore, as discussed in Part II above, all of the voting members of USGBC’s LEED Steering Committee come from private industry, as do the majority of members of its Executive Committee, various advisory committees, and Board of Directors.¹⁵⁴ Because these individuals are tasked with developing new LEED standards, minority interests will almost certainly be repressed. Even if the interests of all parties make it through the committee stage and are represented in a proposed new standard that comes to vote before USGBC membership, there is no guarantee that it will be adopted, as such actions require a two-thirds vote of its primarily private membership in order to pass.¹⁵⁵ Therefore, despite the broad participation of different parties within the USGBC membership, a number of concerns still remain about voice within the organization, and accordantly, with the representation of affected parties generally.

c. Is USGBC’s Power Limited to Rulemaking, or Does It Also Apply the Rules?

Before its recent establishment of the GBCI, USGBC oversaw both the development and enforcement of its own standards. With the creation of GBCI, USGBC relinquished its authority to accredit LEED professionals and to authorize LEED certification of buildings to the new entity.¹⁵⁶ While this separation of powers somewhat mitigates the conflict of interest concerns inherent in a private rulemaker also being the rule enforcer,¹⁵⁷ there is still a lingering concern that many LEED-accredited professionals

152. *Id.*

153. *Id.* at 305. Some of USGBC’s membership categories include accountants, architects, engineers, building controls, consultants, contractors and builders, corporate and retail, distributors, educational institutes, energy service companies, engineers, federal government / GOCOs, financial institutions, insurance companies, interior designers, planners, product manufacturers, and utilities. *See Member Directory, supra* note 24.

154. *See supra* Part II.

155. *See Schindler, supra* note 6, at 307 (footnote omitted).

156. *See Green Building Certification Institute, supra* note 42.

157. *See Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 474 (Tex. 1997).

responsible for certifying projects are also USGBC members and have a hand in setting LEED standards.¹⁵⁸ Thus, potential conflict in this regard remains.

d. Do USGBC Members Have a Conflicting Pecuniary Interest?

As discussed above, the vast majority of USGBC members hail from private industry.¹⁵⁹ These private-sector individuals, who are responsible for setting LEED standards, are the same ones who profit when green projects are developed, leased, and sold—architects, engineers, consultants, real estate agents, product manufacturers, developers, financiers, attorneys, and accountants, among others.¹⁶⁰ “The USGBC, although itself a non-profit entity, is ‘subject to the control of economic actors’ (its building industry membership), and thus ‘will resolve policy issues in a manner that maximizes . . . the profit of those who control it.’”¹⁶¹

The concern is that LEED’s standards enhance profitability for the stakeholders involved at the expense of their supposed environmental benefit. Although concerns about LEED’s efficacy will be covered in greater detail below, they bear noting briefly here. LEED standards are relatively flexible and, for the most part, easily achievable.¹⁶² The ability to cherry-pick which LEED credits to seek during certification (rather than a holistic approach that requires a specific number of points be achieved in each category) causes developers to aim for the “[l]ow-hanging fruit”: inexpensive building improvements that garner LEED credits.¹⁶³ It should not be surprising that LEED’s standards cater to developers—LEED “was created as a marketing tool” for businesses to use to portray themselves and

158. Although information regarding the number of USGBC members who are also LEED-accredited professionals is unavailable, it is safe to assume that some are since GBCI offers accreditation examination fee discounts to USGBC members. See *Fees & Discounts*, GREEN BLDG. CERTIFICATION INST., <http://www.gbci.org/Exam-Guide/application/fees-and-discounts.aspx#Members> (last visited Sept. 22, 2012).

159. See *supra* Part II.

160. In a recent lawsuit against USGBC, the plaintiffs alleged that “USGBC receives massive fees from the owners of buildings seeking LEED certification. And USGBC represents the approximately 140,000 design professionals who it has certified as being able to advise real estate developers and other consumers on how to design a LEED building. In effect, USGBC sponsors and represents a billion-dollar building design business.” First Amended Complaint, *Gifford v. U.S. Green Bldg. Council*, No. 10 Civ. 7747 (LBS), 2010 U.S. Dist. Ct. Pleadings 7747 (LEXIS), at *1–2 (S.D.N.Y. Feb. 8, 2011).

161. Schindler, *supra* note 6, at 329 (quoting Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 404 (2003)).

162. See *id.* at 328–29.

163. See Katherine Walsh, *Smart Companies Take the LEED for Energy Efficiency*, CIO.COM (July 5, 2007), http://www.cio.com/article/122400/Smart_Companies_Take_the_LEED_for_Energy_Efficiency. One example of this “low-hanging fruit” is “lighting, [which] can be made more efficient through [inexpensive] power controls.” *Id.*

their projects as green.¹⁶⁴ It is for this reason that critics of LEED deride it as “a highly lucrative regime of payouts and misinformation,” and “a moral-protection racket.”¹⁶⁵ In the context of government delegation of green building standards to USGBC, some believe that the organization has set standards too low to meet “a government mandate that aims to aggressively alleviate . . . environmental externalities and combat greenhouse gas emissions and other negative contributors to climate change.”¹⁶⁶ It would seem, then, that the pecuniary interest of USGBC’s primary stakeholders is in direct conflict with the broader goals sought to be addressed by green building policy.

e. Is the Delegation to USGBC Narrow in Duration, Extent, and Subject Matter?

This factor is difficult to assess because the extent to which authority has been delegated to USGBC varies among different policies—a policy referring to LEED as one of several appropriate standards clearly transfers less rulemaking authority than does one requiring LEED certification. Even among those policies requiring LEED certification, many are qualified as to project cost, size, or property type.¹⁶⁷ On the other hand, the sheer breadth of policies adopting LEED is an important consideration, particularly in the context of these policies’ influence on building nationwide. Relatedly, LEED’s nationwide reach could result in “the fundamental determinations of what constitutes a ‘green building’ [being] decided by a single entity.”¹⁶⁸ Courts, however, have not considered the delegation of power by state or local governments to be a federal constitutional issue since the 1920s,¹⁶⁹ so it is highly unlikely that these policies would be broadly invalidated. Therefore, an assessment of this factor would really have to be done on a policy-by-policy basis at the state level.

f. Does USGBC Possess Special Qualifications or Training for the Task Delegated to It?

Many of LEED’s committee members are considered experts in their respective fields.¹⁷⁰ There is, however, at least one area in which LEED’s

164. Schindler, *supra* note 6, at 310.

165. Jacob Gershman, *Fake Green Labels: Buildings Don’t Save Energy*, N.Y. POST, Sept. 21, 2009, http://www.nypost.com/p/news/opinion/opedcolumnists/fake_green_labels_aU9PWSSD4p71LigLp0z4eO.

166. Schindler, *supra* note 6, at 329.

167. *See supra* Part III.A–B.

168. Schindler, *supra* note 6, at 300.

169. Lawrence, *supra* note 15, at 649.

170. Schindler, *supra* note 6, at 315.

expertise has been severely criticized: human health. The various criticisms of LEED's lack of effectiveness in protection of human health will be discussed in the following section. For these shortfalls, critics blame USGBC board and committee members: primarily "private executives from the fields of engineering, construction and architecture, and representatives of trade associations . . . [with] little expertise in the chemicals used in the building industry, or the potential effects on human health from exposure to these compounds."¹⁷¹ In fact, there are no medical doctors on the USGBC board, and the organization's only recognized expert on human health-related matters is a single outside public health advisor.¹⁷²

The efficacy of the private delegation in accomplishing the goals of the policy adopting it is imperative to the legitimacy of the delegation. Recall *Independent Electricians & Electric Contractors' Ass'n*,¹⁷³ in which capture by the insurance industry resulted in highly protective fire safety standards.¹⁷⁴ This delegation met the policy goal of protection of human life and property.¹⁷⁵ As the next section details, LEED's effectiveness—protecting human health, saving energy, and minimizing environmental impact—has undergone severe criticism, further undermining the justification for delegation of standard-setting authority to USGBC.

B. CONCERNS WITH LEED'S EFFICACY

The chief concerns with LEED are the criticisms leveled against its effectiveness in creating truly green buildings—those that reduce "impacts on human health and the environment."¹⁷⁶ If the investment in LEED certification is not creating healthier, more efficient, less environmentally impactful buildings, then it is time and money wasted. While particularly troublesome in the context of LEED-based government policy, these efficacy concerns extend to all projects using LEED criteria as their benchmark.

1. Concern that LEED Buildings are Potentially Health Hazardous to Occupants

LEED has been accused of failing to protect human health by

171. ENV'T & HUMAN HEALTH, INC., *supra* note 9, at 10.

172. See *Board of Directors*, *supra* note 26.

173. *Indep. Electricians & Elec. Contractors' Ass'n v. N.J. Bd. of Examiners of Elec. Contractors*, 256 A.2d 33 (N.J. 1969).

174. *Id.* at 37.

175. *Id.* at 37–38.

176. BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.01[1].

encouraging energy efficiency at the expense of basic indoor air quality and for failing to promote certain building products that minimize dangerous chemical emissions. Because energy efficiency requires “tighter” buildings—those with less indoor-outdoor air exchange—the effects of contaminated indoor air are potentially exacerbated in LEED buildings.¹⁷⁷

Energy-efficient buildings often have only 10 percent of the air exchange rates of older buildings that are not as well sealed.¹⁷⁸ Recycled air in these “tight” buildings can result in toxic chemicals accumulating in the indoor atmosphere.¹⁷⁹ Moreover, due to shortcomings in both federal environmental regulation of potentially harmful chemicals present in building materials and USGBC’s failure to adopt standards that promote an array of low-toxin alternatives, many toxins may be as prevalent in LEED-certified buildings—which carry a claim of healthy indoor environments—as they are in noncertified buildings.¹⁸⁰ To the extent that LEED in its present form does account for air quality,¹⁸¹ “only 7 out of a possible 110 points have the primary intent to limit hazardous chemicals within the built environment.”¹⁸² Also, “the average LEED-certified building achieves only 6 percent” of possible indoor environmental quality points.¹⁸³ This is the result of developers being able to pick and choose which points they want to seek at their properties.¹⁸⁴ In fact, a building can achieve LEED Platinum certification—the highest possible LEED rating—without earning any LEED credits for air quality whatsoever.¹⁸⁵ The problem is further exacerbated by the fact that evaluation of individual building components remains undisclosed by USGBC,¹⁸⁶ leaving developers touting their buildings as green unaccountable for their decision not to pursue indoor air quality measures, and hampering any effort to look back to see which

177. ENV’T & HUMAN HEALTH, INC., *supra* note 9, at 8.

178. *Id.* at 18.

179. *Id.*

180. *See id.* at 17–37 (discussing impacts of harmful chemicals such as formaldehyde, tobacco smoke, particulates, pesticides, flame retardants, and additional toxins in drinking water and plastics).

181. For instance, under the most recent LEED New Construction and Major Renovations rating checklist, a building can receive up to fifteen points for “Indoor Environmental Quality,” with points awarded for criteria ranging from “Low-Emitting Materials” to “Daylight and Views.” LEED PROJECT CHECKLIST, *supra* note 36. As prerequisites for certification, the checklist includes requirements of “Minimum Indoor Air Quality Performance” and “Environmental Tobacco Smoke (ETS) Control.” *Id.*

182. ENV’T & HUMAN HEALTH, INC., *supra* note 9, at 13.

183. Wargo, *supra* note 106.

184. *See* ENV’T & HUMAN HEALTH, INC., *supra* note 9, at 13.

185. *Id.* at 13. *See also id.* at 58 app. 1 (demonstrating that a building can meet the minimum eighty LEED points necessary to achieve LEED Platinum certification without obtaining any of the fifteen “Indoor Environmental Quality” points).

186. *Id.* at 10.

building products and methods have worked well at specific properties and which have not.

The USGBC has responded to this criticism, stating that “in practice, project teams look to earn points from across the rating system, and that some of LEED’s indoor health credits are among the most commonly attempted.”¹⁸⁷ In an open letter, USGBC acknowledged that LEED has its shortcomings, but that the “cross-cutting” nature of LEED certification helps ensure that human health benefits inure from reduced energy use, transportation, and wastewater generation.¹⁸⁸ The letter emphasized that, in practice, “it is virtually impossible to achieve higher levels of LEED without achieving [indoor air quality] credits.”¹⁸⁹ Nonetheless, the potential use of toxic building materials in supposedly green buildings and the possibility of achieving the highest level of LEED certification without addressing indoor air quality remain causes for concern as LEED certification may potentially provide “an unwarranted assurance of environmental health protection for those who manufacture, construct and occupy LEED-certified buildings.”¹⁹⁰ As to the proliferation of LEED-based policies, critics caution that they may result in “the passage of truly health-protective building laws [becoming] extremely difficult.”¹⁹¹

Indoor air quality is not the only concern that has been expressed about the health effects of permissible LEED building materials. Also of concern is synthetic turf, which is not only allowed by LEED, but could potentially earn a project developer points for “water efficiency,” “materials selection,” and “innovation in design.”¹⁹² Problems with synthetic turf include its nonbiodegradable nature coupled with its short useful life (normally ten years), “heat island effect” in urban areas, habitat loss for local birds and insects, and carcinogenic compounds that could potentially affect manufacturers and installers.¹⁹³ Further, after finding excessive amounts of lead in synthetic turf products, California’s Attorney General filed suit against several manufacturers of synthetic turf.¹⁹⁴ One of these manufacturers had installed 6500 square feet of synthetic turf at a

187. Tristan Roberts, *New Report Criticizes LEED on Public Health Issues*, ENVTL. BLDG. NEWS, (June 3, 2010), <http://www.buildinggreen.com/auth/article.cfm/2010/6/3/New-Report-Criticizes-LEED-on-Public-Health-Issues>.

188. Open Letter from S. Richard Fedrizzi, *supra* note 147, at 1–2.

189. *Id.* at 2.

190. ENV’T & HUMAN HEALTH, INC., *supra* note 9, at 46–47.

191. *Id.* at 47.

192. *Id.* at 40.

193. *Id.* at 37–40.

194. *Id.* at 40.

LEED Platinum-certified airport hangar in Burbank, California.¹⁹⁵ This is a perfect example of the possible consequences of the problem with making a private trade organization responsible for the setting of green building standards.

2. Concern that LEED Buildings Do Not Save Energy

Another criticism of LEED's efficacy is that buildings certified under its guidelines do not sufficiently save energy. In fact, an analysis by Henry Gifford, a private engineer and one of LEED's most outspoken critics, found that "the best data available shows that on average, [LEED-certified buildings] use more energy than comparable buildings."¹⁹⁶ Gifford's analysis centered upon a study by the New Buildings Institute that analyzed energy performance among LEED-certified buildings. This study, which was the first of its kind to analyze the actual performance of LEED buildings on a broad scale,¹⁹⁷ found that "building performance show[s] average LEED energy use [is] 25-30% better than the national average."¹⁹⁸ Gifford criticized the study's methodology, and concluded that the data—although statistically imperfect—actually supported a finding that the LEED buildings studied used 29 percent *more* energy than comparable buildings.¹⁹⁹ Other reviews of the study have "confirmed the inaccuracy of the USGBC's claims" of energy savings.²⁰⁰ In 2011, Gifford filed a lawsuit against USGBC with federal and state claims of false advertising and deceptive trade practices.²⁰¹ The suit was later dismissed on procedural grounds.²⁰²

Related to this criticism is the concern that LEED's rating methodologies are flawed, resulting in underperformance of supposedly green buildings. Under most of the LEED certification schemes, buildings are analyzed only at the time of certification, and this analysis is based

195. *Id.*

196. HENRY GIFFORD, A BETTER WAY TO RATE GREEN BUILDINGS 1 (2008) (emphasis omitted), available at <http://www.pwarch.com/pwplace/media/Sustainability%20Articles/Henry%20Gifford%20-%20Building%20Rating%20Systems.pdf>.

197. *Id.* at 2.

198. See CATHY TURNER & MARK FRANKEL, NEW BLDGS. INST., ENERGY PERFORMANCE OF LEED® FOR NEW CONSTRUCTION BUILDINGS 5 (2008), available at <http://www.usgbc.org/ShowFile.aspx?DocumentID=3930>.

199. GIFFORD, *supra* note 196, at 4.

200. Gershman, *supra* note 165.

201. See First Amended Complaint, Gifford v. U.S. Green Bldg. Council, No. 10 Civ. 7747 (LBS), 2010 U.S. Dist. Ct. Pleadings 7747 (LEXIS), at *3 (S.D.N.Y. Feb. 8, 2011).

202. Gifford v. U.S. Green Bldg. Council, No. 10 Civ. 7747 (LBS), 2011 U.S. Dist. LEXIS 92625, at *7-13 (S.D.N.Y. Aug. 16, 2011).

purely upon on-paper criteria and not actual building performance.²⁰³ In the context of energy use, these on-paper criteria result in a prediction of what the energy use at the property will be relative to a normal, non-LEED-certified building.²⁰⁴ LEED rewards builders for “predicting that a building will save energy, not for proving that a building actually saves energy,” pressuring designers “to shift their focus from achieving energy efficiency to the appearance of energy efficiency.”²⁰⁵ The fact that the certification scheme does not adjust to reflect true building performance essentially means once a LEED building, always a LEED building. A building owner could theoretically remove the photovoltaic cells from the roof and replace them with more lucrative billboard advertising, or disengage the property’s motion sensors and leave lights on day and night—there would be no LEED certification repercussions.²⁰⁶ In fact, USGBC admitted this outright in its motion to dismiss Henry Gifford’s case against it, stating that “‘the LEED certification process does not assess the *actual* environmental performance of any of the structures for which certification is sought or granted,’ but certifies that they were designed in a way that should result in better performance.”²⁰⁷ It is this sentiment that has led to broader concerns about LEED’s methodology.

3. Concerns with LEED’s Methodology

LEED has been further criticized for creating perverse incentives. For instance, one criticism is that LEED fails to properly prioritize (or require) energy-saving measures in the first instance. Because all improvements are assigned the same nonweighted point value—regardless of expense or potential environmental benefit—the system encourages cheap, easy fixes rather than those that might be the most environmentally beneficial.²⁰⁸ “[A] development could conceivably get one point for installing an energy-efficient HVAC system costing millions of dollars [or] one point for installing a bicycle rack costing several hundred dollars.”²⁰⁹ Clearly, a building developer looking more for the “appearance of energy efficiency” than actual energy performance, or one seeking LEED certification only to take advantage of tax incentives and expedited permitting or to comply

203. See GIFFORD, *supra* note 196, at 5 (discussing one such criterion: the prediction of how much energy the building will use annually).

204. *Id.*

205. *Id.* (internal emphasis omitted).

206. See *id.* at 7–8.

207. *Gifford*, 2011 U.S. Dist. LEXIS 92625, at *2–3 (quoting USGBC’s motion to dismiss).

208. See BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.04[4].

209. *Id.*

with local LEED certification building requirements, would choose the latter.

Furthermore, many LEED opponents contend that LEED does not properly take account of local conditions. For example, “a building in Maine receives the same credit as a building in Arizona for water conservation, even though water conservation is more important in the latter case.”²¹⁰ Likewise, credits for energy efficiency are not weighted to reflect potential high energy use in climates that, for instance, necessitate year-round air conditioning use. This concern was marginally addressed by LEED’s recent inclusion of “regional priority” criteria in the 2009 rating checklist, though only four out of a possible 110 points are available in this category, and they are considered “bonus” points—not the bread and butter of LEED.²¹¹ The absence of a rating system that emphasizes individualized local conditions means that developers may be developing buildings—and receiving LEED certification—for properties that are ill suited for their particular locale.

Additionally, USGBC has recently come under fire for the failure of its LEED rating system to recognize sustainable timber practices besides those of the FSC, thereby excluding 75 percent of sustainably certified North American timber from qualifying for LEED credit.²¹² Governors of fourteen states have asked USGBC to change this criterion, but unless those governors follow in the footsteps of Maine, they are powerless to make a substantive change in the way their LEED-based policies treat sustainable timber.²¹³ This criticism arouses many of the nondelegation doctrine concerns discussed in the previous section, such as the lack of meaningful government oversight, the lack of representation of affected parties, and the potentially conflicting pecuniary interest of USGBC stakeholders.²¹⁴ It also points to broader concerns about whether LEED is actually promoting sustainability, as developers import foreign-grown FSC-certified timber, rather than a similar product grown and milled locally.

V. ADDRESSING CONCERNS WITH LEED & LEED-BASED POLICYMAKING

As Part IV explained, there are a number of concerns with the

210. *Id.*

211. *See* LEED PROJECT CHECKLIST, *supra* note 36.

212. *See supra* Part III.B.

213. *See supra* Part III.B.

214. *See supra* Part IV.A.2.

delegation of rulemaking authority to USGBC. These concerns are food for thought for state courts that may have to adjudicate LEED-based policies in the context of the nondelegation doctrine; more importantly, they should be a consideration of all government actors as they evaluate the legitimacy of their LEED-based policy decisions. All of these concerns, however, may be averted with proper government oversight of the setting of green building standards.

Additional doubts about LEED's efficacy and rating methodology implicate broader concerns about the wide adoption of LEED generally, especially as the "green" building standards of LEED become simply the building standards of tomorrow. In light of the vast sums the government is spending on LEED certification of its own buildings, as well as the tax incentives it is providing to developers to produce buildings that meet LEED's standards, the public deserves a stronger assurance that they are getting their money's worth than LEED currently provides. This should come by way of green building standards that are established with proper government oversight and that are validated and refined with ample *ex post* analysis—neither of which are happening today with LEED. As this Note argues, action is necessary at the federal level to meet the overarching concerns with LEED's adoption as the nationwide green building standard.

A. IMPORTANCE OF THE FEDERAL ROLE IN OVERSEEING GREEN BUILDING POLICY

The federal government is best suited to address the biggest concerns with the existing regime of LEED-based building policy because its decisions have the broadest reach and the widest impact. Although the environmental effects of buildings are primarily local in nature, the bigger issues sought to be addressed by green building—climate change, environmental degradation, and individual health—are national in scope.²¹⁵ The federal government has the authority to monitor USGBC's standards-setting on a level that individual state—and certainly local—governments do not.

LEED is a national standard, but its decisions have trickled down into the policies of state and local governments.²¹⁶ It is understandable why many government entities adopt LEED-based standards rather than attempting to develop their own: as a practical matter, many of them simply

215. See Schindler, *supra* note 6, at 294–95.

216. See *supra* Part III.B.

lack technical expertise with green building.²¹⁷ LEED-based policy adoption allows them to essentially contract out their efforts to go green. As has been discussed, these efforts are undermined by concerns about LEED's efficacy and legitimacy. Without a government-monitored alternative, however, privately promulgated green building standards such as LEED may be their only option.

Some local and state governments alternatively establish their own green building policy standards. Certainly there is an important role for local and state governments to play in tailoring green building policies to their unique environmental needs—inadequate consideration of such conditions has been a criticism of LEED—but there are also concerns with such policies.²¹⁸ First, policies using LEED as a reference may suffer from the same environmental and human health protection pitfalls that concern LEED's critics. Second, local- and state-created green building policies may run afoul of federal law. For instance, an Albuquerque, New Mexico ordinance prescribing the installation of HVAC components exceeding federal energy efficiency guidelines was held to be partially invalid because it was preempted by federal statute.²¹⁹ Absent a comprehensive reevaluation of such federal restrictions, state and local governments may be limited in the extent to which they can set green building standards. Third, a patchwork of varied local and state green building policies, without reference to a broader national standard, may fail to achieve economies of scale as individual actors have to bear the expense of compliance with an array of inconsistent requirements.

B. SPECIFIC SUGGESTIONS FOR IMPROVEMENT

The first and most important step in legitimizing LEED-based government policies—addressing the concerns of delegation of standard-setting authority to USGBC—is federal government oversight. As discussed in Part IV.A., alternatives to the adoption of privately promulgated standards might include consultations between affected groups and administrative agencies, appointments of those affected to administrative boards, and advisory commissions. Perhaps a useful

217. See Schindler, *supra* note 6, at 315.

218. See *supra* Part III.B.3.

219. See *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, 835 F. Supp. 2d 1133, 1137 (D.N.M. 2010). The federal statute in question reads as follows: "A standard prescribed or established under [42 U.S.C. § 6313(a)] shall, beginning on the effective date of such standard, supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established pursuant to such section." 42 U.S.C. § 6316(b)(2)(A) (2006).

example of what oversight might look like is the Appraisal Subcommittee (“ASC”) of the Federal Financial Institutions Examination Council. The ASC was created in response to the Savings and Loan Crisis of the 1980s in order to provide

protection for federal financial and public policy interests in real estate-related transactions by requiring real estate appraisals used in connection with federally related transactions to be performed in writing, in accordance with uniform standards, by appraisers whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.²²⁰

Further, among its duties, the ASC is tasked with monitoring the “practices, procedures, activities, and organizational structure” of the private standard-setting Appraisal Foundation.²²¹ Such an oversight mechanism over USGBC at the federal level would allay concerns about the underrepresentation of affected parties by the organization, USGBC’s hand in the enforcement of its own rules, and the conflicting pecuniary interests of rulemakers.

Once an oversight mechanism is in place, the government could address many of the other prevailing concerns over LEED’s rating methodology and efficacy—problems that have not been corrected in light of USGBC’s entrenchment as a private trade organization and “given its limited . . . expertise[] and financial capacity.”²²² One of the chief concerns is USGBC’s failure to disclose what points have been awarded on individual properties, building systems utilized, and property performance.²²³ This omission prevents a thorough review of certified properties and creates an inability to correct flaws that may be inherent in the system. A proper oversight mechanism would require both rating and property performance disclosures in order to maintain a LEED rating. The EPA’s Energy Star program, which monitors ongoing energy and water use at registered properties,²²⁴ may partially address some of these concerns, and could be made mandatory on certified buildings. Another concern is the permissive tradeoffs that exist in LEED’s rating methodology, which incentivize developers to seek the “low-hanging fruit” rather than the property improvements that may be the most beneficial to both the

220. 12 C.F.R. § 34.41 (2010) (codified at 12 U.S.C § 3331(2006)).

221. *Title XI of FIRREA*, APPRAISAL SUBCOMM. OF THE FED. FIN. INSTS. EXAMINATION COUNCIL, <https://www.asc.gov/Legal-Framework/TitleXI.aspx> (last visited Sept. 23, 2012).

222. Wargo, *supra* note 106.

223. See ENV’T & HUMAN HEALTH, INC., *supra* note 9, at 10.

224. See BENNETT, HOWE & NEWMAN, *supra* note 2, § 1.05[2].

environment and to human health.²²⁵ A proper rating system would ideally take a more holistic approach, better ensuring that the broad range of green building policy goals is met, with a particular focus on regional needs.

Ultimately, as climate change, fossil fuel dependency, and related environmental concerns mount, going green may become so socially imperative that there will be a need to move from today's permissive regime of expedited green building permits and property tax incentives to a system where green building is mandatory. This has already begun to happen in some locales. One of the concerns with adopting status quo green building standards as law today is the fact that there is still so much doubt and debate as to their efficacy. The system of oversight and research proposed herein would result in a much greater assurance of the effectiveness of these policies.

VI. CONCLUSION

Green development is imperative for our future: it is needed to curb energy consumption, environmental degradation, and to protect human health. The broad adoption of the USGBC's LEED rating system into government policy raises many concerns, as does the efficacy of the status quo in meeting those policies' goals. While the oversight system proposed in this Note may increase the burden to green policymaking, it is important that such oversight exist in order to ensure that the LEED-based green building standards that are enacted at the local, state, and federal levels have greater legitimacy and are substantiated by real results. It will also give a greater assurance that we are actually accomplishing our efforts to go green.

225. See Walsh, *supra* note 163.